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No.

In the Supreme Court of the United States

CHARLA MARTIN, as Special Administrator of the Estate of Timijane Martin, CHARLA MARTIN AND TIMOTHY MARTIN, Parents of Timijane Martin,

Petitioners,

v.

SHAWANO-GRESHAM SCHOOL DISTRICT, WAUSAU UNDERWRITERS INSURANCE COMPANY, RICHARD HESS, JEANNE CRONCE, and ANTHONY MARINACK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the lower court's evidentiary analysis of the Martin family's constitutional claims conflict with well-settled summary judgment standards?

2. Are constitutionally protected family liberty interests at stake when, without parental notice, an emotionally distraught seventh grade student is suspended from school and placed on a bus to an empty home where she commits suicide, although state law mandates prompt parental notice, school policy mandates parental notice pre-suspension, and the student handbook mandates pre-suspension parental notice and requires parents to pick up their suspended child from school; furthermore, was this student afforded procedural due process?

3. Does a student's fragile emotional condition, caused or significantly enhanced by a school official's conduct, give rise to a constitutional duty of care to notify her parents and not bus her to an empty home in a distraught condition?

4. Is it rational to treat similarly situated suspended students differently regarding parental notice, parental involvement and custody at school, and punishment?

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, published at 295 F.3d 701 (7th Cir. 2002), is set forth in App. A. The district court's decision and order granting summary judgment is set forth in App. B.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 3, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND POLICY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the U.S. Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. The text of Wisconsin Statutes, Sec. 120.13(1)(b)3 is set forth in App. C.

3. The text of CHAPTER 94, Laws of 1973 is set forth in App. D.

4. The text of Shawano-Gresham School District Student Policy 441 is set forth in App. E.

5. The pertinent text of Shawano Community Middle School Student Handbook is set forth in App. F.

STATEMENT OF THE CASE

The Estate of Timijane Martin and her parents brought this action under 42 U.S.C. § 1983 for damages in the district court which had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a) (3) and (4). Timijane Martin ("Timijane") was a 13-year-old seventh grade student highly ranked as Honor Level One under her school's Discipline Program. She committed suicide after being suspended from school for possession of one cigarette and sent to an empty home in a distraught emotional condition without any parental notification or opportunity to come to her assistance and pick her up from school. Timijane's estate and her parents asserted that their respective procedural and substantive due process and equal protection rights were violated.

The district court granted summary judgment to the defendants on all of the family's constitutional claims and dismissed without prejudice their state law claims. The family appealed to the Seventh Circuit which issued an opinion and entered judgment on July 3, 2002, affirming the district court. The court of appeals held that no familial liberty interests were involved, Timijane received all the due process protections to which she was entitled, the school suspension events did not create or increase a risk of danger even if Timijane suffered severe emotional distress, and

Timijane's equal protection rights were not violated although another simultaneously suspended student was detained at school until her mother was notified and picked her up, and that admissible evidence was insufficient to prove that Timijane received a greater penalty for comparable conduct.

Timijane was a 13-year-old seventh grade student at Shawano Community Middle School ("SCMS"). App. A 2a.[1] On May 19, 1999, SCMS Assistant Principal Anthony Marinack ("Marinack") suspended Tabitha Reiter ("Tabitha"), Timijane's classmate, for three days for having a pack of cigarettes in her locker. Marinack called Tabitha's mother at work between 2:00 and 2:30 p.m. (when classes ended) and left a message for her regarding Tabitha's suspension. App. A 2a; R. 34 Ex. 2 p. 130. Tabitha's mother returned his call, and Marinack kept Tabitha at school until her mother arrived at about 4:00 p.m. App. A 3a, 21a, 32a; R. 34 Ex. 3 p. 3.[2]

While school was still in session, Tabitha informed Marinack that Timijane had cigarettes hidden in a sock in her locker. Marinack went to Timijane's classroom and called her out into the hallway. App. A 3a. Marinack and Timijane walked to her locker and he proceeded to search it. He eventually found one cigarette in a pair of socks located in the

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[1] All citations are made to either the opinions below or the record at the court of appeals. Because the petition includes a summary judgment evidentiary question, this statement of the case under Rule 14.1(g) is necessarily detailed.

[2] Marinack asserted that he kept Tabitha at school because her mother requested it. R. 34 Ex. 2 p. 45. However, Tabitha testified that Marniack talked "to her [her mother] or the secretary there and told her that I was to be picked up at school." R.34 Ex. 8 p. 20.

side pocket of Timijane's backpack. *Id.* Also present in Timijane's locker at the time of Marinack's search was a book entitled "After a Suicide." App. A 3a n.1. Though Marinack testified that he did not notice the title of the book during his search, *id.*, his *post-hoc* incident report stated that he had looked in and at the books, and he testified that he searched the whole locker, including where the books were located. R. 34 Ex. 3 p. 2, Ex. 2 p. 48; R. 55 Ex. E p. 59. The book on suicide was unassigned, and the SCMS social worker, Faith Webster, testified that its presence in Timijane's locker concerned her. R. 34 Ex. 10 p. 37; R. 31 ¶¶ 73, 79.

After Marinack found the cigarette, Timijane began to cry. App. A 3a. He testified that Timijane denied it was hers and said that she was holding it for someone. R. 34 Ex. 2 p. 49. Marinack informed Timijane at her locker that she would receive a three day suspension.[3] App. A 3a. Timijane continued to cry as she returned to her classroom to gather her belongings. Class was still in session. Several students observed Timijane in immediate and obvious distress. *Id.* Jamie Schoenholen ("Jamie"), a student in Timijane's class, testified that Timijane was "crying a lot" and "it wasn't soft ... little tears." R. 34 Ex. 11 pp. 6-7, 23-25. Ashley Raeder ("Ashley") said that Timijane walked past her classroom about the middle of the class, crying and "hyperventilating kind of" (i.e., having difficulty breathing normally) and added that she heard "a loud cry." R. 34 Ex. 9 pp. 21-23.

Brianna Seefeldt ("Brianna"), an eighth grade student, was in the school office when Marinack and Timijane arrived.

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[3] SCMS Principal Jeanne Cronce ("Cronce") testified that Timijane's suspension was effective immediately. R. 55 Ex. B p. 82.

Brianna observed Timijane crying heavily, holding her hands in her face and slouching down while in Marinack's office. R. 31 ¶14. Tabitha, who was also present, stated that Timijane was "crying hard." *Id.* Marinack's incident report stated that Timijane was "sobbing" both on the way to and while in his office. R. 34 Ex. 3 p. 2. Brianna observed Marinack tell Timijane in a "pretty harsh" tone to get into his office and sit down. R. 31 ¶14; R. 34 Ex. 12 pp. 24-25. She said that Marinack's voice was raised and that he was "really yelling" at Timijane (R. 34 Ex. 12 pp. 30-32), and being "mean" to her. R. 55 Ex. N Seefeldt pp. 21-22.

Marinack spoke simultaneously to Timijane and Tabitha in his office and reiterated to them what he told Timijane at her locker, *i.e.*, he could have imposed a five day out-of-school suspension with referral to law enforcement for a possible citation, but he was giving them a break by imposing only a three day out-of-school suspension. R. 34 Ex. 2 pp. 50-51, Ex. 3 p. 2. Marinack testified that the only discipline options were three or five day out-of-school suspensions and referrals, and that in-school detention was not an option. R. 31 ¶10.[4]

Marinack learned from Timijane that her parents were working. App. A 3a. Although Marinack testified that, with questioning, he determined that he could not reach her parents and that Timjane did not respond when he asked her how he could reach them (R. 34 Ex. 2 pp. 26, 83-84), Tabitha

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[4] However, Marinack imposed a three day in-school suspension the previous month on a boy who was actually smoking in the locker room, and Principal Cronce imposed a one day suspension for tobacco possession in 1996. R. 31 ¶¶11, 12; R. 34 Ex. 17, attached letters.

testified that Marinack did not ask Timijane where her parents worked. R. 34 Ex. 8 p. 21. Marinack admitted that he could have obtained her parents' work numbers from Timijane. R. 31 ¶¶16, 42. Marinack did not call Mrs. Martin at work, nor did he consult Timijane's school emergency contact card. R. 31 ¶16. Mrs. Martin was at work until 3:00 p.m. that tragic day. R. 34 Ex. 16 p. 60.

Marinack testified that he asked Timijane if she needed to take the bus home and she replied affirmatively. R. 26 Ex. 2 p. 27. However, Timijane was supposed to walk to softball practice near school that day where her mother was to pick her up. App. A 17a n.11; R. 34 Ex. 16 pp. 33-34, Ex. 29. Mrs. Martin testified that Timijane was picked up from school two to three times per week due to athletic practices and choir. R. 34 Ex. 16 pp. 33-34. Despite Timijane's emotional state, Marinack sent her home on the bus without notifying her parents, emergency contact, or available school counselors. App. A 4a; App. B 32a; R. 34 Ex. 2 p. 133, Ex. 16 p. 76; R. 26 Ex. 2 p. 70. District Superintendent Richard Hess admitted that if Timijane was very emotional, crying uncontrollably and hyperventilating, help should have been sought for her immediately. R. 34 Ex. 4 pp. 66-67. Timijane was still crying when she left Marinack's office. App. A 4a.

After Timijane left Marinack's office, she encountered several classmates who uniformly observed her in a highly distressed emotional state.[5] Although Marinack did not report

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[5] Andrea Kraemer ("Andrea"), a classmate, observed Timijane in the school foyer minutes after she left Marinack's office and testified that Timijane was hysterical and hyperventilating, specifically noting that she was "beet red" and "crying very hard," and that she was "[v]ery confused, kind of distant, really upset," "[h]er eyes were kind of wandering" and "[s]he didn't really look

that he observed Timijane after she left his office (R. 34 Ex.

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very focused." App. B 33a; R. 34 Ex. 10 pp. 23, 27, 30-31. Andrea also testified (without an objection) that Timijane stated that her suspension was not fair because Tabitha's penalty was less harsh. R. 34 Ex. 10 p. 28. Ashley testified that Timijane was crying very hard and hyperventilating, which she described as having trouble breathing normally, and "breathing like faster." App. B 33a; R. 34 Ex. 9 pp. 36–38, 43. Both Ashley and Andrea tried to comfort Timijane and gave her hugs. R. 34 Ex. 9 pp. 36-37, Ex. 10 pp. 32-34. Brigitte Menard ("Brigitte") testified that Timijane was gasping, shaking, and she was unable to speak clearly. App. B 33a. Her first reaction was to comfort Timijane because of her crying which Brigitte described as "like a sobbing." She added that Timijane was hyperventilating (*i.e.*, "you tend to gasp when you stop crying, you can't catch your breath for a while"), and her speech "was coming out in short words." R. 34 Ex. 13 pp. 24–26, 31. Jamie saw Timijane both before and after the office visit and testified that Timijane was crying hard and consistently throughout. R. 31 ¶18; *see supra* at 4. Jeremy Wood ("Jeremy"), a student who observed Timijane outside while waiting for their bus, testified that Timijane's cry sounded like a "mild wail." App. B 33a; R. 34 Ex. 14 pp. 19-22.

In stark contrast to all the above eyewitnesses, as well as to student observations of Timijane's severe distress before and during the office meeting, and to Marinack's own report which noted Timijane's "sobbing" (*see supra* at 4-5), Marinack testified that she "did not cry hard" at any time between the locker search and her office departure to board the bus. R. 26 Ex. 2 p. 65. The decision below made no reference to any of these students' and the bus driver's specific observations of Timijane's severe emotional pain but did reference Marinack's self-serving opinions that Timijane's reaction was "normal," that she was composed enough to ask about homework, and that if a student's reaction to discipline was out of proportion he would involve appropriate professionals. App. A 15a n.9.

3), Mrs. Martin saw Marinack in the school parking lot, by chance, while later searching for her daughter,[6] and testified that he told her that he "watched her get on the bus." R. 34 Ex. 16 p. 76.

After Timijane was bussed to an empty home, Marinack left a message on the Martins' home answering machine concerning Timijane's suspension. App. A 4a. Although Marinack testified that he left the message before Timijane left school (R. 34 Ex. 2 p. 28), he later admitted that he had not left the home message until between 2:45 and 3:15 p.m. R. 34 Ex. 2 p. 130.

The school bus driver reported that Timijane had been "her usual carefree self" during the ride to school, but on the ride home, she was "180° out from her norm." R. 34 Ex. 18 pp. 1-2. Once Timijane arrived home, she went to the basement where she hung herself. App. A 4a. After Mrs. Martin was told by Marinack in the school parking lot that Timijane was bussed home, she immediately returned home where she found Timijane hanging in the basement by a red nylon dog leash. App. A 4a; App. B 25a-26a. She immediately called 911, but Timijane could not be saved. App. A 4a. Gary Swenson ("Swenson"), a SCMS consulting psychotherapist on suicide,[7] opined that Timijane killed

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[6] Mrs. Martin arrived home around 4:00 p.m., but did not discover Timijane at that time. After hearing Marinack's phone message, she went to the baseball field where Timijane had practice that afternoon, but not finding her there, she then drove to school where she saw Marinack in the parking lot. App. A 4a.

[7] The school district consulted with Swenson in 1997 after a principal hung himself. R. 34 Ex. 2 p. 88, Ex. 4 p. 74, Ex. 27 p. 50. Marinack knew that prior to Timijane's suicide the district

herself due to her inability to deal with her suspension crisis and that appropriate professional intervention may have calmed her down. R. 23 ¶72; R. 34 Ex. 23 pp. 35, 37. Five students (Jamie, Ashley, Andrea, Jeremy and Brigitte) and Timijane's bus driver all agreed that Timijane had been happy or behaving in a normal fashion prior to her suspension.[8] R. 31 ¶¶36, 37; R. 34 Ex. 9 pp. 43-44, Ex. 10 pp. 37-38, Ex. 14 p. 17, Ex. 18 pp. 1-2.

REASONS FOR GRANTING THE WRIT

The petition should be granted on all questions presented. The Seventh Circuit's treatment of the evidentiary record on summary judgment conflicted with this Court's well-established standards. With respect to question two, the Seventh Circuit ignored a stream of family relations decisions by this Court and the methodology for determining the existence and contours of constitutionally protected familial liberty interests, and the opinion's analysis of Timijane's individual procedural due process claims conflicts with pertinent decisions of this Court. As to question three, the Seventh Circuit's conclusion that an emotionally distraught seventh grader's medical condition imposed no duty of care upon a school official conflicts with settled substantive due

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principal and three students had committed suicide, including one student who hung himself after he was suspended without parental notification R. 31 ¶23; R. 51.

[8] Although Tabitha testified that Timijane had discussed suicide with her during the lunch hour on the day of her death (App. A 12a n.7), Ashley testified that she was Timijane's best friend, had spent that entire lunch hour with her, and was positive that no suicidal statement was made. R. 55 Ex. N Raeder p. 15; R. 34 Ex. 9 pp. 43-44.

process methodology under the post-*DeShaney* regime applied by all courts of appeal. Regarding question four, the Seventh Circuit's holding that Marinack's disparate treatment of Timijane was rational conflicts with the evidence and is legally incorrect.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING WELL-SETTLED SUMMARY JUDGMENT METHODOLOGY.

The pertinent evidentiary record regarding Timijane's suspension process and Marinack's knowledge of her severe emotional distress compelled him to notify her parents and not place her on a bus to an empty home while in a medical crisis. Petitioners respectfully submit that the court below disregarded settled summary judgment methodology in entering judgment against the petitioners on each constitutional claim. Specifically, the court below extensively relied upon the testimony of Marinack--an interested party whose credibility was disputed by other testimony--and the court also ignored material evidence submitted by the petitioners.

On summary judgment, the court below was mandated not to resolve doubtful evidentiary matters in favor of the school officials. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1982) (*per curium)* ("On summary judgment the inferences to be drawn from the underlying facts contained in [affidavits, attached exhibits, and depositions] must be viewed in the light most favorable to the party opposing the motion."); *see also* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2716, pp. 274-277 (3d ed. 1998). Any inferences

drawn from the factual record "must be viewed in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The court "may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). Motive and intent may not be evaluated on summary judgment because they are issues for the jury. *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979). A court may only consider evidence favoring the nonmovant and evidence supporting the moving party that is uncontradicted and unimpeached--"at least to the extent that that evidence comes from disinterested witnesses." *Reeves*, 530 U.S. at 151 (internal quotation omitted). The court below, therefore, was required to "disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.* The lower court's treatment of the evidentiary record, as is addressed *passim*, did not comport with these fundamental summary judgment principles.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT REGARDING FAMILY LIBERTY INTERESTS AND CORE DUE PROCESS PRINCIPLES.

A. FAMILY LIBERTY INTERESTS ARE VESTED IN THE CONTEXT OF TIMIJANE'S SUSPENSION.

This Court has long recognized the right to familial relations as a constitutionality sanctified liberty interest and has repeatedly enshrined as fundamental the specific right of

parents to care for their children.[9] *See Troxel v. Granville*, 530 U.S. 57 (2000) (the Due Process Clause "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" *Id.* at 65, *citing Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)). "The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, 530 U.S. at 65. In *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) this Court stated:

> The law's concept of the family rests on a presumption that parents possess what a child

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[9] *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (There is "a fundamental liberty interest of natural parents in the care, custody, and management of their child."); *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("The Court has frequently emphasized the importance of the family."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (a child's education has always been regarded as a matter "of supreme importance which should be diligently promoted").

> lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it is recognized that natural bonds of affection lead parents to act in the best interests of their children.... Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.

Equally fundamental is the right of a child to be nurtured by her parents, and even temporary separation of a child from her parents resulting from governmental conduct triggers constitutional protection.[10]

Significantly, these fundamental liberty interests were made contextually express and detailed by Wisconsin law and mandatory school policy which guaranteed the right of Timijane's parents' to be notified and participate in the school suspension process, and to exercise their substantive right, obligation, and duty to take physical custody of Timijane at school following her suspension and provide appropriate parental care. Wisconsin law dictated Timijane's parents' meaningful involvement and substantive stake in the school suspension process:

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[10] *See J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) ("We recognize that the forced separation of parent from child, even for a short time, represents a serious impingement upon both the parents' and the child's rights.") (internal quotations omitted).

> The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason for the suspension.

Section 120.13(1)(b)3, Wis. Stats. App. C 67a. The Wisconsin Legislature found that "suspension of a pupil from school is for the purpose of bringing the pupil, his parent or guardian, teachers, counselors and school officials together to discuss and resolve the pupil's academic and disciplinary problems." CHAPTER 94, Laws of 1973 (emphasis added). App. D 68a. School Policy 441 mandated pre-suspension notice to Timijane's parents and the opportunity for their direct participation in the disciplinary process:

> Before, (sic) any disciplinary action such as expulsion or suspension is taken against a student, the student has a right to the due process guaranteed him/her by state law. Any student accused of an action and threatened with punishment for this action shall:
> 1. Be advised of the reason for the disciplinary action.
> 2. Have the right to explain his/her actions or his/her side of the allegations.
> 3. Have his/her parent(s) or guardian notified if under eighteen and/or living at home; and
> 4. Have a right to a hearing before the district administrator and/or Board, with the student's parent(s), legal counsel, or guardian present if desired.

App. E 69a. (emphasis added) Significantly, the SCMS Student Handbook guaranteed the substantive right of Timijane's parents to take physical custody of her at school:

> "Parents will be notified of disciplinary action resulting in an out-of-school suspension and will be expected to pick up their child from school following the notification."

App. F 70a-71a (emphasis added).[11]

"Even while at school, the child brings with [her] the support of family." *Ingraham v. Wright,* 430 U.S. 651, 670 (1977). The explicit, mandatory dictates of §120.13(1)(b)3, Wis. Stats., School Policy 441, and the Student Handbook entitled Timijane's parents to be notified, participate in the suspension process, and take physical custody of her at school. State law or policy which dictates an official's conduct or limits his discretion may create a protected liberty interest. *See Kentucky Dept. of Corrections v. Thompson,* 490 U.S. 454, 462-63 and n.4 (1989) (statutes or rules with

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[11] The court below concluded that "we believe a more logical reading of this provision, however, is the reading Marinack gave it, namely that parents are expected to pick their child up if the suspension occurs during the school day." App. A 9a. The court accepted Marinack's interpretation although it does not appear in the Handbook, he is an interested party whose credibility is also in question, and his explanation for why the Handbook was not adhered to in Timijane's case was inconsistent. One of his explanations was that this requirement did not apply to suspensions occurring late in the day. R. 34 Ex. 2 pp. 131-133. However, in earlier testimony, he admitted that the Handbook required that he notify parents of both discipline and the school's expectation that they pick up their child; and, he testified that he did not do so in Timijane's case because he determined, after questioning her, that her parents were unreachable (R. 34 Ex. 2 p. 26), which is both inconsistent with the explanation adopted by the court and inaccurate. *See supra* at 5-6.

"explicit mandatory language" may create liberty or property interests). With respect to Timijane's parents, the school suspension scheme expressly sets forth mandatory language, and the substantive predicate, that in every school suspension, parents too must be informed, have the right to participate in the suspension process, and are expected to pick up their child from school. This mandatory scheme created a liberty interest for Timijane to have her parents' physical presence, care, and support, and it also created a corresponding parental liberty interest in the suspension process, and their substantive right and duty to take physical custody of her at school. Succinctly put, state law or school policy may entitle students and their parents to more than the Constitution expressly demands, thereby creating specific liberty or property interests. *See Board of Pardons v. Allen,* 482 U.S. 369 (1987); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974). "Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim or entitlement' protected by the Due Process Clause." *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (internal citation omitted). Timijane and her parents had legitimate claims of entitlement to family unity prior to her solitary departure from school.

The opinion below ignored these controlling precedents which set forth the appropriate analytical framework regarding creation of liberty interests under state law, and it summarily and incorrectly concluded that failure by school officials to conform with §120.13(1)(b)3, Wis. Stats., School Policy 441, and the Student Handbook could not result in any constitutional violation of Timijane's or her parents' liberty interests.

B. TIMIJANE'S INDIVIDUAL PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED.

In addition to concluding that Timijane's parents had no constitutional rights at stake, the Seventh Circuit also incorrectly concluded that under *Goss v. Lopez*, 419 U.S. 565 (1975), Timijane received all of the constitutional protections to which she was entitled.[12] In *Goss*, this Court held that public school students have, under the Fourteenth Amendment, a legitimate property entitlement to a public education and a reputational liberty interest in not being suspended except for good cause. Thus, Timijane had vested liberty and property interests at stake arising from her education which mandated due process protections prior to her suspension from school. However, the lower court misstated the holding of *Goss* in concluding: "The

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[12] In *Smith v. Severn,* 129 F.3d 419 (7th Cir. 1997), the Seventh Circuit earlier referenced parents as being within the protection of core *Goss* principles:

> We believe that both Mrs. Smith and Brandon had notice of what Brandon had done and what violation of the disciplinary code had resulted. Furthermore, Brandon was given a pre-suspension hearing in which Mrs. Smith and Brandon were allowed to give their version of the event. ...Due process is satisfied as long as Mrs. Smith and Brandon were given pre-suspension notice of a proper charge and the conduct that supported that charge.

Id. at 428 (emphasis added).

Constitution does not require pre-suspension parental notification or a pre-suspension hearing." App. A 9a. *Goss* states: "[A]s a general rule notice and hearing should precede removal of the student from school." *Goss*, 419 U.S. at 582. Such a misreading of *Goss* also undermines the fundamental goals of procedural due process. In *Carey v. Piphus*, 435 U.S. 247, 259-64 (1978), this Court stated that procedural due process serves two significant goals pertinent in the school setting: 1) protecting against unjustified property and liberty deprivations, and 2) conveying the sense that the school has acted with fundamental fairness. *Accord Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 308 n.11 (1986) (actual damages available for deprivation of procedural due process rights in school setting).

The "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), *quoting Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The specific procedural due process protections set forth in the statute, School Policy 441, and the Student Handbook implement well-settled due process standards which mandate that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See Dusenbery v. United States*, 534 U.S. 161 (2002) (confirming that *Mullane* supplies the appropriate analytical framework for resolving the reasonableness of the notice and opportunity to be heard). Here, Charla Martin and Timothy Martin were "interested parties" who received no notice of their child's suspension

until after her suicide, and Timijane was foreclosed from having their support during the entire suspension process.[13]

Further, "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970). A jury may reasonably conclude, based on the evidence submitted, that it was obvious that this sobbing and distraught seventh grade child was emotionally impaired from defending herself against the summarily imposed suspension, and that she required parental assistance and support which was denied.

Finally, a due process hearing must include the opportunity to respond to the propriety of the sanctions to be imposed. *See Morrissey v. Brewer*, 408 U.S. 471, 488 (1972) (in parole revocation hearing, parolee entitled to demonstrate

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[13] The decision below disregarded evidence that the school district and SCMS routinely ignored due process protections regarding suspensions. School form letters sent to parents of suspended students ignored Policy 441 and state law appeal rights. (No letter was sent to Timijane's parents, but the respondents produced letters concerning other student suspensions. R. 34 Ex. 17 p. 3.) No communications or instructions regarding Policy 441 were ever issued and there is no record of any parental meetings, hearings, or appeals concerning any suspension from SCMS prior to Timijane's suicide. R. 55 ¶¶ 9, 10, 11 & Ex. H, I, J. Other SCMS parents complained about being denied any involvement in their children's suspensions (R. 34 Ex. 25 pp. 5-9; R. 51-53), and one student was specifically told that she could do nothing about her suspension. R. 54. Marinack never told Timijane that she had the right to appeal her suspension, and he testified that he was never advised to provide that information to a student or his/her parents. R. 31 ¶¶51, 54; R. 34 Ex. 2 p. 121.

that a violation does not warrant revocation); *see also Lamb v. Panhandle Community Unit Sch. Dist. No. 2*, 826 F.2d 526, 528 (7th Cir. 1987) (student suspended for three days entitled to present mitigation argument at a board hearing). A penalty mitigation opportunity was foreclosed because Timijane was expressly misinformed that she was receiving the mildest penalty available.[14] *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 543 (1985) (even if the evidence is conclusive, the appropriateness of discipline may not be certain; thus, official should exercise discretion prior to imposing discipline).[15]

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[14] Material penalty mitigation factors which Marinack did not consider include: lesser penalties had been imposed previously (*see supra* at 5 n.4); Timijane was an Honor Level One student who sought to follow the rules (R. 34 Ex. 5 p. 142; R. 31 ¶86); and, she was treated more harshly than Tabitha whose conduct was more egregious in that she brought the cigarettes to school and claimed to be Timijane's supplier (*see infra* at 28-29 n.23; R. 34 Ex. 3 p. 1, Ex. 8 p. 15).

[15] The district court concluded that "Mrs. Martin did have an opportunity to discuss the matter with Marinack in the parking lot as he was leaving work, and she seems not to have disputed the fairness of the discipline at that time." App. B 58a. This *ad hoc* conversation was clearly an inadequate notice and hearing opportunity to discuss mitigation, and it followed Timijane's suspension and death. Marinack testified that Mrs. Martin asked him twice if he knew where Timijane was. R. 26 Ex. 2 p. 70. When he replied that he watched her get on the bus, Mrs. Martin was most concerned about that fact, rather than Timijane's school conduct (of which she knew nothing from Timijane's perspective), and she left immediately to find her daughter. R. 34 Ex. 16 p. 76, 84. Further, Marinack's report does not reveal that he said anything to Mrs. Martin about either parent coming in to meet with him the following day to discuss the suspension. R. 34 Ex. 3. Marinack

Because Timijane's parents had no notice of her suspension before her enforced departure from school and suicide, no opportunity to participate in the suspension process, and were foreclosed from picking her up at school and comforting her as a family, they are entitled to proceed to trial for violation of their own and their deceased daughter's familial liberty interests.[16] Additionally, the evidence adduced of inadequate notice and a non-meaningful hearing opportunity for Timijane compels submission of her individual procedural due process claims to the jury.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S STANDARDS, WELL SETTLED IN ALL CIRCUITS, REGARDING THE CONSTITUTIONAL DUTY TO AMELIORATE A STATE CREATED OR ENHANCED DANGER.

Summary judgment prevents a jury from even considering whether Marinack's harsh and mean behavior towards Timijane and his respective failures to notify her parents of her suspension and obvious emotional distress, seek in-school counseling for her, call her emergency contact on file, and to take any ameliorative measures prior to putting her on a bus to an empty home while in a medical crisis, were

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admitted that he never gave appeal right information to parents or students. *See supra* at 19 n.13.

[16] Because the lower court held that no constitutional violations could be proven at trial, the court did not reach any of plaintiffs' constitutional claims under *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978) which are fairly presented and reserved in this petition. *See, e.g., supra* at 19 n.13.

the moving force which resulted in her separately compensable severe emotional pain, and also in her suicide.

In the seminal case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200-201 (1989), this Court recognized, as an exception to the general rule that the government owes no duty to protect individuals from harm, that the Constitution imposes an affirmative duty of care and protection in circumstances where the state has created or enhanced a dangerous situation. *See Butera v. District of Columbia*, 235 F.3d 637, 648-650 (D.C. Cir. 2001) (citing the decisions of all other circuit courts of appeals which have uniformly recognized the *DeShaney* "state-created danger" doctrine). This doctrine has developed in the Seventh Circuit,[17] but its applicability to the school suspension crisis herein was absolutely rejected as a matter of law. The decision below expressly held:

> [T]he school did not create or increase a risk to Timijane by suspending her from school, even if that action caused severe emotional distress.
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> * * *

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[17] *See, e.g., Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir.), *cert denied*, 510 U.S. 947 (1993) (*DeShaney* "leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger."); *Nabozny v. Podlesny*, 92 F.3d 446, 460 (7th Cir. 1996) (school officials' failure to act may be actionable if it increased pre-existing risk of harm to student); *Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998), *cert. denied*, 528 U.S. 810 (1999) ("a state can be held to have violated due process by placing a person in a position of heightened danger without cutting off other avenues of aid.").

> The alleged knowledge of her fragile emotional state is irrelevant for purposes of the due process clause.

App. A 14a, 16a. (footnote omitted). The court did concede that if "the state created or increased the danger in the first instance," App. A 15a, then counseling or keeping Timijane at school until her parents could pick her up would have been required. This concession was surplusage, however, because the court rejected application of the "state-created danger" doctrine to the school suspension process.

This holding starkly contradicts fundamental "state-created danger" principles under the *DeShaney* regime adopted by every court of appeals and usurps the role of the jury to sift and evaluate evidence. The court below rejected this body of precedent, ignored the voluminous body of evidence regarding Timijane's severe emotional distress, and made impermissible credibility and evidentiary findings in contradiction to settled summary judgment methodology. [18]

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[18] *See* Section I, *supra*. For example, the court accepted Tabitha's contention that Timijane had previously made suicidal statements to her, including during lunch on the day of her death. App. A 12a n.7. However, the court ignored Ashley's testimony which contradicted Tabitha. *See supra* at 9 n.8. Also, the court ignored the testimony of five students and the report of the bus driver which all indicated that Timijane had been happy or behaving normally prior to being suspended but that she exhibited extreme distress thereafter, and the court ignored the professional opinion of Swenson that she killed herself due to her suspension crisis and that intervention may have helped her. *See supra* at 4-9. If a professional retained by the school as an expert on suicide can reach the conclusion that Timijane's death was caused by the suspension crisis, then so may a jury similarly and reasonably conclude.

The court concluded that no matter how abusive a school official's conduct may be, and no matter how emotionally fragile the child becomes as a consequence of that abusive conduct, the official owes no duty of care--particularly once the school bell rings. No *DeShaney* principle and no court of appeals decision supports such a conclusion, and the most analogous case starkly conflicts with this summary judgment.

In *Armijo v. Wagon Mound Public Schools,* 159 F.3d 1253 (10th Cir. 1998), summary judgment was denied to school officials under the "state-created danger" doctrine where a non-sobbing, sixteen-year-old, high school student committed suicide after being suspended from school and dropped off at home without parental notification. The Tenth Circuit expressly found that the school had created a dangerous condition by suspending the student and sending him home--even though evidence was not cited that school officials knew that his parents were not at home. Here, the Seventh Circuit rejected the *Armijo* holding because of the purported lack of an "affirmative act" (App. at 18a), i.e., in *Armijo*, the school took the boy home during the school day; here, the school simply "relinquished control of Timijane at the end of the school day. . . ." *Id.* Semantics aside, analysis of liability under the Constitution does not distinguish between "action" and "inaction." *See Farmer v. Brennan*, 511 U.S. 825, 839 (1994); *see also Board of the County Comm'rs. v. Brown*, 520 U.S. 397, 419 (1997) (Souter, J., dissenting) ("[I]naction by a policymaker deliberately indifferent to a substantial risk of harm is equivalent to the intentional action that setting policy presupposes."); *Pavlick v. Mifflin*, 90 F.3d 205, 208-09 (7th Cir. 1996) (applying same principles). Furthermore, the circumstances in *Armijo*, including harassing conduct and a threat of violent behavior by the student, arguably supported his emergency removal from school. Here, Timijane was pulled from her classroom

and summarily suspended because one cigarette was found in a sock--a non-emergency which cannot justify failing to attend to her resultant medical crisis.[19] Furthermore, unlike in *Armijo*, Marinack knew with certainty that Timijane's parents were not at home to attend to her. Unlike the situation in *DeShaney*, Marinack's conduct placed Timijane in "a worse position than that in which [she] would have been had [he] not acted at all." *DeShaney*, 489 U.S. at 201. Timijane's plan was to attend softball practice with friends after school. Instead, Marinack tragically altered her plan and she ended up home alone, instead of having her parents' custody and support.

Consequently, liability must be evaluated by a jury based on school officials' knowledge (or lack thereof) of their respective duties towards Timijane and her parents, and their specific conduct responsive thereto (active or passive). *See Anderson v. Creighton*, 483 U.S. 635, 639, 641 (1987); *Mitchell v. Forsyth*, 472 U.S. 511, 535 n. 12 (1985); *see also* this Court's most recent decision in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, ___ U.S. ___, ___, 122 S.Ct. 2559, 2565 (2002) (acknowledging public schools' inherent "custodial responsibilities" and interest in protecting the safety and health of its students).

Ironically, the lower court cited with approval a statement in *Hasenfus v. LaJeunesse*, 175 F.3d 68, 73 (1st Cir. 1999) (distinguishing *Armijo* and finding no substantive due process liability where student attempted suicide in school

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[19] Principal Cronce conceded that nothing prevented Marinack from waiting until the following school day to inform Timijane of the disciplinary action to be imposed. R. 34 Ex. 5 p. 83.

locker room after a classroom reprimand) that "the primary responsibility for safeguarding children from this danger, as from most others, is that of their parents. . . ." Here, school officials abrogated both their *in loco parentis* duty and their duty to Timijane's parents by failing to notify them of Timijane's suspension and her emotional condition until after her suicide. Consequently, Timijane's parents had no opportunity to fulfill their "primary responsibility" to safeguard their beloved child.

IV. NO RATIONAL BASIS JUSTIFIES TREATING SIMILARLY SITUATED SUSPENDED STUDENTS DIFFERENTLY REGARDING PARENTAL NOTICE, PARENTAL INVOLVEMENT AND CUSTODY AT SCHOOL, AND PUNISHMENT.

Because the lower court found that no family relations were implicated, App. A 20a-21a nn.12, 13, the minimalist rational basis test was applied to Timijane's individual equal protections claims that: a) Marinack did not contact her parents, although he called Tabitha's mother and detained Tabitha at school for ninety minutes until her mother picked her up; and b) Marinack imposed more severe punishment on her than was imposed on Tabitha, whose conduct was (at best) similar. Certiorari should be granted to vacate and reverse the summary judgment equal protection holding that no family liberty interests were at stake and that discriminatory treatment of Timijane was rational.[20]

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[20] On remand, the strict scrutiny test requiring proof of a compelling school interest applies to Timijane's and her parents' fundamental family liberty interests claims arising from their total

Timijane's distinct educational property and liberty interests were evaluated under the rational basis test. The rationale advanced by Marinack for not contacting Timijane's parents -- deemed adequate by the lower court -- was the time of day the suspension was imposed. App. A 21a.[21] However, timing did not prevent Marinack from contacting her parents. Tabitha's mother had been contacted only minutes earlier; Marinack admitted that he could have obtained her parents' work numbers and kept her in his office until she informed him how to reach her parents; the busses had not yet arrived (Timijane and Jeremy waited for their bus after she spent time in the school foyer with several students who were attempting to comfort her after she left Marinack's office); and, by asking if he should contact her mother he was acknowledging that he had time to do so. *See supra* at 3, 6-7 and n.5; *see infra* at 28 n.22. In any event, such rationales cannot possibly further any legitimate educational goal because they violated Marinack's mandatory duty to notify Timijane's parents and inform them that they should pick her up at school. Marinack was the Assistant Principal and

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separation between Marinack's initial confrontation of Timijane and her suicide. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

[21] The court also noted Marinack's assertion that Timijane told him that she would take the bus home. *Id.* In this regard, the court found that after Marinack asked her if she was sure that he should not contact her mother, she "repeated that she would take the bus home." App. A 4a. Although Marinack testified that when asked about contacting her mother, she said that she would take the bus home, his report recorded a different response to that question (i.e., her dad was off work the next day and Marinack could call then). R. 34 Ex. 2 p.72, Ex. 3 p. 3.

Timijane was a seventh grader. It was his responsibility to exercise both his *in loco parentis* duty and his administrative obligation to follow mandatory school suspension policies. A child can not dictate to her Principal which mandatory duties he may choose to disregard. Furthermore, Marinack's recital of his conversation with Timijane has been materially contradicted and disputed. *See supra* at 4-8.

Also, Marinack decided to keep Tabitha in school after the 2:30 p.m. dismissal bell until her mother could pick her up at about 4:00 p.m.,[22] by which time Timijane had already hung herself. Given his simultaneous investigation of Tabitha's and Timijane's circumstances, his conference with Timijane directly following his conference with Tabitha, his detention of Tabitha for ninety (90) minutes after school until her mother picked her up, his failure to notify Timijane's parents and to detain her until they could pick her up, Marinack's conduct was arbitrary and cannot pass muster under even a rational basis analysis. Further, Marinack imposed a discriminatory three day suspension with additional penalties on Timijane without any meaningful opportunity for her to argue for mitigation.[23] *See Village of Willowbrook v.*

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[22] Marinack conceded that nothing prevented him from telling Timijane that he would not let her leave until she told him how to reach her parents at work. R. 34 Ex. 2 p. 84.

[23] Charla Martin's affidavit and the testimony of Andrea and Tim Martin regarding Timijane's disproportionate discipline were improperly rejected. The district court characterized as "last minute" (App. B 60a) Mrs. Martin's affidavit attesting that Marinack told her in the school parking lot that he had also ordered Timijane to miss the first three volleyball games next season and a field trip. App. A 22a. Timijane's disparate punishment was originally referenced in the Complaint, and was also testified to in

Olech, 528 U.S. 562, 564-565 (2000) (*per curiam*) (arbitrary conduct towards one person sufficient to prove equal protection violation). A jury may also find, as Brianna testified (*see supra* at 5), that Marinack was "really yelling" and being "mean" to Timijane and may also conclude that he was motivated by "subjective ill will." *See Albiero v. City of Kankakee,* 246 F.3d 927, 932 (7th Cir. 2001) (ill will a separate basis for finding an equal protection violation, though not reached in *Village of Willowbrook*). In sum, no legitimate educational goal was advanced by Marinack's discriminatory treatment of Timijane.

Mr. Martin's deposition. R. 1 ¶19; R. 34 Ex. 37 p. 47. The district court also erroneously concluded that all other evidence indicated that identical punishment was imposed. App. B 60a. However, Andrea testified that Timijane told her that Tabitha had received a milder penalty. *See supra* at 6 n.5. The Seventh Circuit rejected Andrea's testimony as hearsay, although no objection was made by the respondents. App. A 22a. But, the court did not supply a hearsay objection with respect to any alleged statements by Timijane to Marinack--an obviously interested party. The court also found that Marinack's testimony that he did not impose additional punishment on Timijane was not contradicted by Andrea. App. A 22a-23a. However, Marinack did not testify on the subject of additional punishment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted on all four questions and the subsidiary questions presented therein.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3193
[Filed July 3, 2002]

CHARLA MARTIN, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF TIMIJANE MARTIN AND PARENT OF TIMIJANE MARTIN, AND TIMOTHY MARTIN, PARENT OF TIMIJANE MARTIN, Plaintiffs-Appellants,	)
v.	)
SHAWANO-GRESHAM SCHOOL DISTRICT, RICHARD HESS, WAUSAU UNDERWRITERS INSURANCE COMPANY, et al., Defendants-Appellees.	)

Appeal from the United States District Court
for the Eastern District of Wisconsin
No. 99 C 1313
Rudolph T. Randa, Judge

Before RIPPLE, MANION, and EVANS, *Circuit Judges*.

OPINION

MANION, *Circuit Judge*. On May 19, 1999, Timijane Martin, a 13-year-old seventh grader at Shawano Community Middle School in Shawano, Wisconsin, was suspended from school for possessing a cigarette on school grounds. After returning home at the end of the school day, Timijane committed suicide. Timijane's parents, individually and on their daughter's behalf, sued the Shawano-Gresham School District, the Assistant Principal who suspended Timijane, and various other school officials, alleging substantive and procedural due process claims, an Equal Protection claim, and supplemental state law claims. The district court granted the defendants summary judgment on the federal claims and dismissed the state claims without prejudice. The Martins appeal, and we affirm.

I.

In 1999, Timijane Martin was a seventh grader at the Shawano Community Middle School. On the afternoon of the school day on May 19, 1999, some students told the assistant principal at Shawano, Anthony Marinack, that Tabitha Reiter, a friend of Timijane's, had some cigarettes with her at school. Based on this information, Marinack searched Tabitha's locker, where he found a pack of cigarettes. Marinack called Tabitha from class to his office and told her that she would be suspended from school for three days. Marinack then called Tabitha's mother at work and left a message for her regarding Tabitha's suspension.

While in Marinack's office, Tabitha informed him that Timijane also had cigarettes in her locker, hidden in a sock. Marinack then went to Timijane's classroom and called her out into the hallway. He asked her if she had any cigarettes; she claimed that she did not. Marinack and Timijane then walked to her locker, where he again asked her if she had any cigarettes. Once again she denied having any. Marinack then searched her locker, eventually finding a cigarette in a pair of socks located in the side pocket of Timijane's backpack.[1] After he found the cigarette, Timijane began to cry, telling Marinack that she was holding the cigarette for someone else. Marinack told her that she still possessed tobacco on school grounds, which was against school policy, and therefore, she would be receiving a three-day suspension.

Timijane continued to cry as she returned to her classroom to gather her belongings. Several students saw Timijane during this time, and they stated that she was crying pretty hard. Back in his office, Marinack reassured both Tabitha and Timijane that they had been good kids in school and had not been in a lot of trouble before and were not in a lot of trouble now. Despite these reassurances, Timijane continued to cry. Marinack asked Timijane where her parents were and learned that they were working. Timijane told Marinack that her father would be off work the next day, and would come to school to discuss her suspension. While Marinack was talking to Timijane, Tabitha's mother returned Marinack's earlier phone call and informed him that she would pick Tabitha up from school. While Marinack was still

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[1] Also in the locker was a book entitled "After a Suicide," although Marinack stated in his deposition that he did not notice the title of the book while he was searching for cigarettes.

on the phone with Tabitha's mother, the 2:30 bell rang, signaling the end of the school day. Marinack asked Timijane if she needed to take the bus home from school, and she replied that she did. Marinack then asked her if she was sure that she did not want him to contact her mother. Timijane repeated that she would take the bus home. Still crying, Timijane left Marinack's office. While waiting to get on the bus she talked to a few classmates, and then took the bus home. After she left for home, Marinack left a message on the Martins' home answering machine alerting them to Timijane's suspension. Tragically, once she arrived home, Timijane went to the basement and hung herself.

Timijane's mother arrived home about 4:00 p.m., but did not discover Timijane at that time. Instead, she heard Marinack's phone message and immediately drove to the school. Mrs. Martin explained that she first went to the baseball field because Timijane played recreational softball[2] and she had practice that afternoon. After not finding her there, she drove to the school where she found Marinack in the parking lot. Mrs. Martin and Marinack began discussing Timijane's suspension, but at some point during the conversation, Mrs. Martin asked where Timijane was, and when Marinack told her that she had taken the bus home, Mrs. Martin returned home. She found Timijane in the basement and immediately called 911, but they were unable to save Timijane.

After her death, Timijane's parents sued Anthony Marinack, the Assistant Principal, Jeanne Cronce, the

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[2] The softball team was not affiliated with the middle school.

Principal, Richard Hess, the Superintendent, William Matthias, the Assistant Superintendent, the Shawano Community Middle School, and the Shawano-Gresham School District (hereinafter defendants) under Section 1983, alleging both substantive and procedural due process claims, and an Equal Protection claim.[3] The Martins also asserted state law claims of negligence. Following discovery, the defendants moved for summary judgment. The district court granted the defendants summary judgment on the plaintiffs' constitutional claims and dismissed the supplemental state law claims without prejudice. The plaintiffs appeal.

II.

On appeal, the plaintiffs argue that the district court erred in granting the defendants summary judgment on their substantive due process, procedural due process, and Equal Protection claims. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). We review the grant of summary judgment *de novo*, considering the evidence in the light most favorable to the nonmoving party. *Shanoff v. Illinois Dept. of Human Servs.*, 258 F.3d 696, 701 (7th Cir. 2001).

A. Procedural Due Process

The Martins first contend that the defendants violated Timijane's procedural due process rights by suspending her without providing parental notice and a hearing prior to the

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[3] By stipulation, the parties agreed to dismiss William Mathias and the Shawano Community Middle School from the suit.

suspension. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court held that public school students have a property interest in public education, and thus a right to procedural safeguards. However, under *Goss* students have a right to only minimal process: "[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him, and if he denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story." *Id.* at 581.

In this case, the undisputed evidence established that the defendants complied with the procedural due process mandates of *Goss*. Specifically, Marinack informed Timijane of the charges against her– possession of a cigarette on school premises – and he allowed Timijane an opportunity to present her side of the story, which she did, explaining that she was holding the cigarette for a friend. However, Timijane did not deny the charge, nor could she, as she was present when Marinack searched her locker and found the cigarette. Marinack then explained to Timijane that it was irrelevant that she was holding the cigarette for a friend because it was in her locker and school rules prohibit possession of cigarettes on school grounds for any reason.[4]

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[4] On appeal, the Martins point out that the school rules only expressly prohibited the *use* of tobacco on school grounds, not the possession of tobacco. However, they fail to present this as a separate procedural due process claim, or if they intended to, they failed to develop the argument on appeal, and thus have waived it. *Duncan v. State of Wis. Dep't of Health and Family Servs.*, 166 F.3d 930, 934 (7th Cir. 1999) (appellants waive argument by failing to develop argument in briefs on appeal). In any event, the

In response, the Martins argue that due process requires more, citing Section 120.13(1)(B) 3 of the Wisconsin Code which provides that "[t]he parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason for the suspension." Wis. Stat. § 120.13(1)(B)(3). They also point to Policy 441 of the Shawano-Gresham School District, which provides:

> Before any disciplinary action such as expulsion or suspension is taken against a student, the student has a right to the due process guaranteed him/her by state law. Any student accused of an action and threatened with punishment for this action shall:
>
> > 1. Be advised of the reason for the disciplinary action.
> >
> > 2. Have the right to explain his/her actions or his/her side of the allegations.
> >
> > 3. Have his/her parents(s) or guardian notified if under eighteen and/or living at home; and

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evidence established that the students knew that it was against school rules to have cigarettes on school grounds, and Wisconsin state law also makes it illegal for a minor to possess tobacco. Wis. Stat. § 254.92. Thus, a procedural due process claim based on this argument would fail on its merits.

> 4. Have a right to a hearing before the district administration and/or Board, with the student's parent(s), legal counsel, or guardian present if desired.

The defendants maintain in response that nothing in the language of either Section 120.13(1)(B)(3) or Policy 441 mandates pre-suspension parental notification or a pre-suspension hearing. We need not resolve this interpretative dispute, however, because the failure to conform with the procedural requirements guaranteed by state law does not by itself constitute a violation of federal due process. *Pro-Eco, Inc. v. Board of Comm'rs of Jay County, Ind.*, 57 F.3d 505, 514 (7th Cir. 1995) (a violation of a state procedural statute does not offend the Constitution); *Wallace v. Tilley*, 41 F.3d 296, 301 (7th Cir. 1994) ("The denial of state procedures in and of itself does not create inadequate process under the federal constitution."); *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) ("[A] violation of state law . . . is not a denial of due process, even if the state law confers a procedural right."). Therefore, even if Section 120.13(1)(B)(3) or Policy 441 required more, Timijane cannot state a procedural due process claim based on the alleged failure to conform to state law. And as set forth above, the Supreme Court has held that in the context of a short-term suspension, only minimal due process is required under the U.S. Constitution, and the undisputed evidence established that the school provided that requisite process.

The Martins also point to the Student Handbook which provides: "Parents will be notified of disciplinary action resulting in an out-of-school suspension and will be expected

to pick up their child from school following the notification." While the Martins contend that this provision required the school to detain Timijane after school hours, we believe a more logical reading of this provision, however, is the reading Marinack gave it, namely that parents are expected to pick their child up if the suspension occurs during the school day. In any event, as just noted, the failure to comply with state procedural rules cannot form the basis for a federal constitutional claim. *See supra* at 7. Therefore, we conclude that the Student Handbook cannot form the basis for a procedural due process claim.

In sum, while the U.S. Constitution requires a school which suspends a student to provide that student with due process, the process required is minimal. *Goss*, 419 U.S. 565. The undisputed facts in this case demonstrate that the defendants complied with the constitutional mandates by notifying Timijane of the basis for the disciplinary action and an opportunity to provide her side of the story. The Constitution does not require pre-suspension parental notification or a pre-suspension hearing. Moreover, even if state law required more than the Constitution, that cannot form the basis of a federal due process claim.[5]

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[5] In addition to pursuing a procedural due process claim on behalf of Timijane, the Martins claim that their procedural due process rights were also violated. However, as discussed above, the defendants provided all of the process required under the Constitution, so the Martins' independent claim fails as well.

B. Substantive Due Process

Next, the Martins claim that the defendants violated Timijane's substantive due process rights by suspending her from school, thereby causing her severe emotional distress, and then by failing to affirmatively protect Timijane from that distress. This, according to the Martins, caused her to commit suicide. To address Timijane's substantive due process claim, we start with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989), which sets forth the basic law concerning substantive due process claims against state actors in this situation.

In *DeShaney*, despite strong evidence that Joshua DeShaney's father was physically abusing him, the county social services agency returned the four-year-old to his father's custody. *Id.* at 192. After he was returned to his father, the assigned case worker noticed more suspicious injuries, and emergency room physicians continued to call Child Protective Services about injuries to Joshua, but the state failed to remove him or to take other actions to protect him. *Id.* Joshua's father eventually beat his son so severely that Joshua suffered permanent brain damage, leaving him severely retarded and likely to spend the remainder of his life in an institution. *Id.* at 193. Following the beating, Joshua sued the state agencies and individuals responsible for the decision to return him to his abusive father, alleging that the defendants violated Joshua's substantive due process rights. *Id.*

The Supreme Court in *DeShaney* held that even though the defendants suspected ongoing abuse, they had not deprived Joshua of his right to due process because the Due

Process Clause's "purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 195-96. As the Court explained, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.* at 195. Thus, the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means." *Id.*

While *DeShaney* concluded that the Due Process Clause does not generally require the state to act affirmatively to protect people from harm from private actors, *DeShaney* also recognized that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198. Since the Supreme Court rendered its decision in *DeShaney*, this circuit has recognized two such "limited circumstances": "One exists if the state has a special relationship with a person, that is, if the state has custody of a person, thus cutting off alternate avenues of aid. The other is the state-created danger exception." *Monfils v. Taylor*, 165 F.3d 511, 515 (7th Cir. 1998) (internal citations omitted). On appeal, the Martins do not claim that the defendants had a special custodial relationship with Timijane, rather, they rely on the "state-created danger" exception.[6]

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[6] This and three other circuits have generally rejected the idea that a school has a "special custodial relationship" with a

In *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), we summarized the "state-created danger" exception stating "that plaintiffs . . . may state claims for civil rights violations if they allege state action that created, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to danger [than] they otherwise would have been." *Id.* at 1126. Based on this language, the Martins argue that they can succeed on a substantive due process claim because the defendants either created the risk that Timijane would commit suicide, or rendered Timijane more vulnerable to the risk of suicide by suspending her from school.[7] Because

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student for purposes of the *DeShaney* exception. *See J.O. v. Alton Comm. Unit Sch. Dist. 11*, 909 F.2d 267, 272-73 (7th Cir. 1990); *Wyke v. Polk County Sch. Bd.*, 129 F.3d 560, 569 (11th Cir. 1997); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1370-73 (3d Cir. 1992).

[7] The defendants argue that the risk that Timijane would commit suicide existed before her suspension. After Timijane's death, the school learned that prior to her suspension, Timijane had discussed committing suicide in three letters to Tabitha, and in one or two telephone calls with Tabitha. Also, on the day of her death, Timijane told Tabitha at lunch that she felt like hanging herself because a former boyfriend had given her a dirty look and because she felt "ugly and stupid and fat" and was unable to "get a boyfriend." Unfortunately, Tabitha did not tell the school or Timijane's parents of these conversations until after her death. While this evidence indicates that there was a risk of suicide prior to the suspension, and thus the school did not *create* the risk, the "state-created danger" exception may also apply if the state increased a risk or danger, which the Martins claim the suspension did in this case. *Stevens v. Umsted*, 131 F.3d 697, 704-05 (7th Cir. 1997) (*DeShaney* "state-created" exception applies if the state

the school created or increased the danger, the Martins argue, substantive due process required the defendants to take affirmative steps to protect Timijane, by, for instance, providing her with counseling or holding her at school until her parents could pick her up.

While there is no case law in this circuit directly on point, *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998), provides a helpful analogy. In *Collignon*, 28-year-old Jonathan Collignon committed suicide after being released from police custody. Following his death, Jonathan's estate sued the police officers and others involved, claiming that the defendants had violated Jonathan's substantive due process rights by releasing him from custody over the objections of Jonathan's father and stepmother, who had pleaded with the police department to retain custody of Jonathan and obtain medical treatment for his paranoid schizophrenia. Relying on *DeShaney*, this court first held that "the plaintiffs cannot base their claims on the assertion that [the defendants] had an obligation to stop Jonathan from committing suicide once he had been released from the jail." *Id.* at 987. We further concluded that "the plaintiffs cannot claim that the County defendants should have involuntarily committed Jonathan to a mental health facility: Due process protects people from being unlawfully restrained; it provides no right to be restrained, lawfully or otherwise." *Id.*

This court then considered whether the state had increased the risk to Jonathan. The plaintiffs in *Collignon* had argued that by seizing Jonathan and then detaining him, the

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"creates the danger *or renders a person more vulnerable to an existing danger.*") (emphasis added).

defendants had increased the risk that he would commit suicide. *Id.* at 992. Therefore, according to the plaintiffs, "the due process clause require[d] the state to protect him to the extent of ameliorating the incremental risk." *Id.* This court rejected that argument, concluding that while "[i]t is certainly possible that custody, even when quite temporary, is stressful for mentally ill persons like Jonathan, . . . temporarily detaining someone in Jonathan's situation does not expose him to an 'incremental risk' that must then be ameliorated." *Id.*[8]

As noted in *Collignon*, "[d]ue process protects people from being unlawfully restrained; it provides no right to be restrained, lawfully, or otherwise." *Id.* at 991. Thus, the Martins' general claim that the defendants violated Timijane's substantive due process rights by allowing her to return home at the end of the school day cannot succeed. The Martins' reliance on the "state-created" danger exception of *DeShaney* also falls short. In *Collignon*, the state did not create or increase the risk of suicide by arresting Jonathan, even where the arrest caused severe emotional distress. So too, here the school did not create or increase a risk to Timijane by suspending her from school, even if that action caused severe emotional distress.

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[8] In *Collignon*, this court noted that the police actually reduced the risk Jonathan faced because he was released to his parents, whereas prior to his arrest he was wandering the streets. *Id.* But that fact does not change the basic conclusion of *Collignon* that temporarily detaining someone, even if it causes mental distress, does not "increase the risk" of harm within the meaning of *DeShaney*, necessitating state affirmative action. *Id.*

On appeal, the plaintiffs also argue at length that the defendants should have known that Timijane was at risk to commit suicide. First, they claim that Marinack should have been aware of Timijane's extreme distress because she was crying hysterically.[9] They also claim that Marinack must have seen the book entitled "After a Suicide" in Timijane's locker during the search, and therefore should have known that Timijane was at risk to commit suicide. Additionally, the Martins claim that previous suicides by other students and a district principal should have put the defendants on notice of the risk of suicide. However, whether or not that evidence should have put the defendants on notice that Timijane was at risk, the Constitution does not require the school to act affirmatively in the ways the plaintiffs claim (providing her with counseling after school hours or keeping her at school after hours until her parents could pick her up), unless the state created or increased the danger in the first instance. Here the defendants did not create or increase the risk that Timijane would commit suicide, and therefore they did not have an

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[9] The defendants challenge the Martins' description of Timijane as hysterical, pointing to testimony by Marinack that while at times she was crying pretty hard, she was not crying constantly, and she was also composed enough to ask questions about how she could obtain her homework assignments. Marinack also stated that he believed that Timijane's reaction to her suspension was normal for a middle school student in that situation who had not been in a lot of trouble before. Marinack also stated that if a student's reaction to discipline was out of proportion to a particular situation, he would involve the school psychologist, social worker or guidance counselor. However, for purposes of this motion, we must view the facts in the light most favorable to the plaintiffs.

affirmative obligation to protect Timijane after school hours. The alleged knowledge of her fragile emotional state is irrelevant for purposes of the due process clause.[10]

The Martins respond by citing *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253 (10th Cir. 1998). In *Armijo*, sixteen-year-old Philadelfio Armijo, a special education student at Wagon Mound Public Schools, committed suicide after being suspended from school and driven home without parental notification. After Philadelfio's death, his parents sued the school district and various school officials alleging that the defendants violated Philadelfio's substantive due process rights. The district court denied the defendants summary judgment, and the Tenth Circuit

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[10] The plaintiffs' focus on the defendants' knowledge of the risk to Timijane would be relevant to the question of "deliberate indifference." However, because we conclude that the defendants did not create or increase the risk of suicide by suspending Timijane, we need not reach the question of whether the defendants acted with deliberate indifference, which would be necessary to create constitutional liability. *See Armstrong v. Squadrito*, 152 F.3d 564, 577 (7th Cir. 1998). However, even assuming that Timijane was distraught after her suspension and that Marinack saw the title of the book "After a Suicide" in her locker, that would not be enough to demonstrate that the defendants had a "conscious disregard of [a] known or obvious danger," *id.*, that Timijane would return home that afternoon and kill herself. The defendants had no knowledge that Timijane had threatened suicide in the past, and there is no evidence that she had threatened suicide in the presence of Marinack or other school officials. *Compare Armijo* 159 F.3d at 1257 (school may be liable for student's suicide where the school sent the student home during school hours and after he had told a school aide that "I'd be better off dead").

affirmed, applying the "state-created danger" exception to *DeShaney*. The Tenth Circuit explained that "[t]he key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, . . . " *Id.* at 1263 (quoting *Johnson v. Dallas Ind. Sch. Dist.*, 38 F.3d 198, 201 (5th Cir. 1994)). To be liable, the Tenth Circuit continued, "the environment created by the state actors must be dangerous; they must know it is dangerous; and, . . . they must have used their authority to create an opportunity that would not otherwise have existed for the third party's [acts] to occur." *Armijo*, 159 F.3d at 1263 (quoting *Johnson*, 38 F.3d at 201). Applying this standard, the Tenth Circuit concluded that the school created a dangerous condition by suspending Philadelfio, which caused him to become distraught and to threaten violence, and then taking him to his home and leaving him alone where at least some of the defendants knew that he had access to firearms and that he had threatened suicide in the past.

Even if we were to accept the *Armijo* standard that the school created a danger and thus could be liable under *DeShaney*, the Martins' argument would still not succeed. The Martins have not shown that the school defendants "used their authority to create an opportunity that would not otherwise have existed for the third party's [acts] to occur." *Id.* at 1263. Rather, the school relinquished control of Timijane at the end of the school day, just as it would have done had she not been suspended.[11] Conversely, in *Armijo*, the court concluded that

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[11] The Martins point out that Timijane was supposed to have gone to softball practice (for a community team, as opposed to a school team) after school, as opposed to taking the school bus home. There is absolutely no evidence that the defendants knew

the school created a risk that otherwise did not exist by removing Philadelfio from school during school hours, driving him home, and then leaving him there alone in the middle of the school day. In that case, it was not the suspension that created a risk to the child, but the school's affirmative act of taking the student home alone during the middle of the school day. No such evidence of an affirmative act was presented here.

The First Circuit's decision in *Hasenfus v. LaJeunesse*, 175 F.3d 68 (1st Cir. 1999), illustrates the limited application of *Armijo*. In *Hasenfus*, the parents of 14-year-old Jamie Hasenfus sued the Winthrop Middle School and others after their daughter attempted to kill herself at school. Jamie had tried to commit suicide after she was reprimanded in front of her classmates by a teacher during a physical education class and then sent back into the locker room. "No one from the school staff was supervising the locker room. After returning to the locker room, Jamie tried to hang herself." *Id.* at 70. Classmates found Jamie before she died, but she went into a coma and, even after waking up, spent several weeks in the hospital and suffered permanent injuries. *Id.* The First Circuit concluded that the defendants could not be liable for violating Jamie's substantive due process claims, distinguishing *Armijo*. *Id.* at 74. First, the court noted that whether or not it agreed with the Tenth Circuit, the facts in *Armijo* were very troubling. Specifically, the Tenth Circuit noted that in *Armijo*, the school sent the student home during the school day, even though the school

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this, and in fact the evidence indicates that Timijane told Marinack the exact opposite--that she was supposed to take the school bus home.

officials knew that the student, who was a special education pupil not fully able to care for himself, had previously threatened suicide, and that he had access to a firearm at home. *Id.* In contrast, the court in *Hasenfus* explained, there was no evidence that Jamie had threatened to kill herself then or at any other time, and it did not send her home alone during the school day. *Id.*

This case is even more removed than *Hasenfus*. In this case, like in *Hasenfus*, there was absolutely no evidence that the school authorities knew that Timijane had threatened suicide at any time. But here, unlike Jamie Hasenfus, Timijane did not attempt suicide during school hours or on school premises. Thus, the plaintiffs can only succeed if they establish that the school had a duty to protect Timijane from suicide *after* the school day ended. But as *Hasenfus* recognized, "the primary responsibility for safeguarding children from this danger, as from most others, is that of their parents; and even they, with direct control and intimate knowledge, are often helpless." *Id.* at 73. Because the defendants did not create or increase a risk that Timijane would commit suicide by suspending her and then allowing her to return home at the end of the school day, the Martins' substantive due process claim must fail.

C. Equal Protection Claim

Finally, the plaintiffs contend that the defendants violated Timijane's rights under the Equal Protection clause. Specifically, the Martins (on Timijane's behalf) contend that, even though Timijane and Tabitha were similarly situated, they were treated differently in two ways: First, while Marinack directly contacted Tabitha's mother at work and

gave her the opportunity to pick Tabitha up at school, Marinack never tried to contact Timijane's parents at work to give them the same opportunity. Second, the Martins claim that Marinack punished Timijane more severely than Tabitha by not only suspending her for three days but by also ordering Timijane to miss the first three volleyball games of the next season and a field trip.

Typically, an equal protection claim focuses on the denial of a fundamental right or disparate treatment of persons depending on the claimant's suspect classification. We examine such claims under a more exacting strict scrutiny test, while other equal protection claims are examined under the deferential rational basis test. *David K. v. Lane*, 839 F.2d 1265, 1270 (7th Cir. 1988). Timijane's Equal Protection claim involves neither. Not only is she not in a suspect class, but the right to education is also not considered a fundamental right. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). Nonetheless, the Supreme Court has held that an individual may state a "class of one" equal protection claim if she has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotations omitted).[12] This

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[12] On appeal, the Martins also contend that Timijane's Equal Protection claim requires strict scrutiny because it is based on the denial of the fundamental right to family relations. The right to familial relations is a fundamental right protected by the Constitution. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). However, the alleged violation of Timijane's rights – the disparate treatment in her discipline – does not implicate the right to familial relations. The right to familial relations concerns the family

is because "the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.*

The question remains then as to whether Marinack had a rational basis for treating Timijane and Tabitha differently. Marinack explained that he called Tabitha's mother at work because he had discovered the cigarettes in Tabitha's locker first and earlier in the school day. However, by the time he had searched Timijane's locker and had her in his office the school day was almost over. Marinack further explained that he kept Tabitha at school because her mother had returned his earlier phone call. On the other hand, the dismissal bell rang before Marinack had contacted Timijane's parents, and while he was still discussing her suspension. As Marinack explained in his deposition, he asked Timijane if she had to take the bus home and she said that she did. Marinack then asked her if she wanted him to call her mother, but she again said she would take the bus home. Under these circumstances, and in light of the different timing involved, Marinack's differing treatment of Tabitha and Timijane was rational.[13]

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relationship, not school disciplinary matters. Therefore, we conclude, as the district court did, that her claim is judged under the rational basis test.

[13] To the extent the Martins are pursuing an Equal Protection claim on their own behalf for this same differing treatment, that claim also fails because Marinack had a rational reason for contacting Tabitha's mother but not Mrs. or Mr. Martin.

The Martins also claim that Timijane was treated more severely than Tabitha because in addition to a three-day suspension, Marinack ordered her to miss the first three volleyball games of the next season and a field trip. Marinack testified in his deposition that he did not order Timijane to miss the volleyball games or the field trip, and that he only suspended her for three days, just like he did with Tabitha. To support their claim, Mrs. Martin points to her affidavit in which she attested that Marinack told her in the school parking lot that he had ordered Timijane to miss the first three volleyball games next season and a school field trip. The district court, however, struck that affidavit because it contradicted her deposition testimony. While the Martins do not challenge that evidentiary ruling on appeal, they do claim that there was other evidence that Timijane was punished in this manner. Specifically, the Martins point to Mr. Martin's deposition testimony in which he said that he understood from Mrs. Martin that Timijane was also suspended from three volleyball games the following year. However, to the extent that Mr. Martin is repeating what his wife told him, that evidence is inadmissible hearsay. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). To the extent Mr. Martin testified as to his "understanding," he lacked personal knowledge as to the punishment ordered, and as such that evidence is inadmissible, and thus cannot create a factual issue. *Gustovich v. AT&T Comm., Inc.*, 972 F.2d 845, 849 (7th Cir. 1992). The Martins also rely on testimony from a classmate of Timijane who stated that after her suspension Timijane said that she felt it was unfair that Tabitha's penalty was more lenient. This also constituted hearsay, and even if it were admissible, the classmate's statement does not contradict Marinack's testimony that he did not order Timijane to miss the three volleyball games and a

field trip. Moreover, to be liable, the defendants would have had to have acted with deliberate indifference in meting out the differing punishments, but there is insufficient evidence to support that finding. *See Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002). Therefore, the defendants were entitled to summary judgment on Timijane's Equal Protection claim.

III.

The tragedy of suicide, especially of a young person, cannot be overstated--it is the loss of a precious life. It leaves everyone questioning how it could happen and how it could have been prevented, and it is understandable that the Martins look to the school in their search for answers. But notwithstanding their anguish and the tragedy of Timijane's death, the defendants did not violate either Timijane's or the Martins' constitutional rights,[14] so we must AFFIRM.

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[14] Because we conclude that the facts fail to support a constitutional claim, we need not reach the question of qualified immunity or whether the school district had a custom or policy creating municipal liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982); *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

[Filed July 20, 2001]

No. 99-C-1313

CHARLA MARTIN, as Special Administrator of the Estate of Timijane Martin, CHARLA MARTIN, and TIMOTHY MARTIN,	)
Plaintiffs,	)
v.	)
SHAWANO-GRESHAM SCHOOL DISTRICT, SHAWANO COMMUNITY MIDDLE SCHOOL, WAUSAU UNDERWRITERS INSURANCE COMPANY, RICHARD HESS, WILLIAM MATTHIAS, JEANNE CRONCE, and ANTHONY MARINACK,	)
Defendants.	)

DECISION AND ORDER

This action, which arises from the death of young Timijane Martin ("Timijane"), comes before the Court on a motion for summary judgment by the defendants. At the time of her death, Timijane was a seventh-grade student at the Shawano Community Middle School ("SCMS") in the Shawano-Gresham School District ("SGSD"). Timijane committed suicide at her parents' home on the afternoon of May 19, 1999, not long after Anthony Marinack ("Marinack"), the Assistant Principal of SCMS, disciplined her for possession of tobacco on school grounds. Timijane's parents, Charla and Timothy Martin, and her estate, maintain that the defendants' handling of this disciplinary matter caused Timijane's death and violated rights protected by the Fourteenth Amendment, Title IX of the Education Amendments of 1972 ("Title IX"), and Title Vl of the Civil Rights Act of 1964 ("Title VI"). In addition to seeking money damages under 42 U.S.C. § 1983 ("Section 1983"), the plaintiffs assert state law claims for negligence. Several school officials, including Marinack, are named as defendants in both their individual and official capacities. For the reasons set forth below, the Court enters summary judgment in favor of the defendants.

BACKGROUND

If Timijane were alive, she would now be approaching her sixteenth birthday. Defendant's Proposed Findings of Fact ("DPFOF"), ¶ 1.[1] On May 19, 1999, however, she used

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[1] Unless otherwise indicated, references to the Defendants' Proposed Findings of Fact ("DPFOF") or to the

a red nylon dog leash to hang herself from a joist in the basement of her parents' home, causing death by asphyxiation. Affidavit of Willard P. Techmeier ("Techmeier Aff."), Exhibit 19. The horror of this young person's death, and the magnitude of her parents' loss, cannot be overstated. In assessing the potential liability of the defendants, however, it is proper to consider what they knew and how they behaved *prior* to Timijane's suicide. In the absence of constructive or actual knowledge that there was an imminent danger of suicide, the defendants may not even be charged with negligence, much less constitutional deprivations that "shock

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themselves, terribly complicated, the record has become a confusing tangle of proposed factual findings, responses, supplemental proposed findings, responses to supplemental proposed findings, "additional facts," affidavits, and exhibits. Plaintiffs' counsel has compounded this confusion by submitting lengthy and often argumentative responses to the defendants' proposed factual findings. A case in point is the Plaintiffs' Response to Defendants' Supplemental Proposed Findings of Fact. For reasons stated in an earlier opinion, the Court allowed the plaintiffs to submit this document and specified a page limit of five pages. Plaintiffs' counsel has submitted a five-page document in ten-point type with very narrow margins, accompanied by a stack of affidavits (5) and exhibits (18) measuring about one inch in thickness. The response goes *significantly* beyond the scope of answering the supplemental proposed findings. For example, in response to a proposed finding (No. 12) about whether Marinack saw a certain book in Timijane's locker, the plaintiffs re-state an argument concerning a *separate* factual matter, *i.e.*, the extent to which Marinack saw Timijane after disciplining her for possession of tobacco. Such misuses of summary judgment procedure are inconsistent with Local Rule 56.2 and needlessly complicate the Court's task in determining the undisputed, material facts.

suicide, the defendants may not even be charged with negligence, much less constitutional deprivations that "shock the conscience." With these considerations in mind, the Court turns to the events preceding Timijane's death.

Timijane was a "good kid" who rarely got into trouble at school. DPFOF, ¶ 3. To her mother she seemed a "very upbeat, very athletic, very happy" young person. Deposition of Charla Martin ("C. Martin Dep."), p. 86 [Techmeier Aff., Exhibit16]. Most of Timijane's friends also describe her as having an outwardly cheerful disposition. Andrea Kramer even agreed that it would be fair to describe Timijane as "very . . . happy-go-lucky." Deposition of Andrea Kramer ("Kramer Dep."), p. 37 [Techmeier Aff., Exhibit10]. A more troubling picture emerges from the testimony of Tabitha Reiter ("Tabitha"), arguably Timijane's best friend. Deposition of Tabitha Reiter ("Reiter Dep."), p. 7 [Affidavit of Gregg Heidenreich ("Heidenreich Aff."), Exhibit 3]. According to Tabitha, prior to May 19, 1999, Timijane discussed committing suicide once or twice in telephone conversations and also in a letter. *Id.*, pp. 5, 7-8.[2] Timijane, her friend recalls, attributed her desire to commit suicide to feelings that she was "ugly and stupid and fat" and could not "get a boyfriend." *Id.* Similarly, during the lunch period on May 19, 1999, Tabitha remembers Timijane saying that she felt like hanging herself because a former boyfriend had given her a dirty look. *Id.* Tabitha told Timijane "not to think like that" because she was "a good friend." *Id.* Regrettably,

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[2] Although Tabitha kept the letter and gave it to the Principal at SCMS *following* Timijane's death, this document is not included in the summary judgment record.

however, Tabitha did not mention Timijane's comments to school personnel, or to anyone else, until it was too late. *Id.*[3]

As of May 19, 1999, Anthony Marinack had been the Assistant Principal at SCMS for nearly two years. Deposition of Anthony Marinack ("Marinack Dep."), pp. 7-8 [Heidenreich Aff., Exhibit 2]. His responsibilities included disciplinary matters, attendance and scheduling. *Id.*, p. 10. On May 19, two students informed Marinack that Tabitha was in possession of cigarettes on school grounds. DPFOF ¶ 8; PPFOF, ¶ 5. At the time, SCMS had a written policy against smoking by students on school grounds. Techmeier Aff., Exhibit 1. The policy, printed in the student handbook, stated that smoking was "strictly prohibited" and that violations of the policy would "result in suspension and notification to police liaison officer and parents." *Id.* Similarly, the SGSD had a district-wide policy against the "use" of tobacco products on school property. PPFOF, ¶ 4; Techmeier Exhibit 2. Neither policy specifically prohibited what the plaintiffs refer to as the "mere" possession of tobacco. Plaintiff's Brief In Opposition to Motion for Summary Judgment ("Plaintiff's Brief"), p. 1. In any event, the students at SCMS - including those who "ratted out" Tabitha for having cigarettes - obviously understood that "mere possession" was forbidden.

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[3] *See* DPFOF, ¶ 64. This key point is not genuinely disputed by the plaintiffs, although, without explanation, they do characterize Tabitha's "claim" that she kept these matters to herself as "incomplete." *See* "Additional Facts to Defendants' Proposed Findings of Fact," p. 12. In theory a jury *could* disbelieve Tabitha, but it is difficult to imagine why Tabitha would construct such a lie and the plaintiffs have not given any reason why her testimony should be regarded as unreliable.

One of Timijane's classmates, when pressed about the details of the school's tobacco policy, stated, "Well, I'm not really sure about it; but I just know like if you got caught with them or whatever, you would get in trouble." Deposition of Jamie Schoenholen ("Schoenholen Dep."), p. 8 [Techmeier Aff., Exhibit 11]. Indeed, the school's disciplinary records reveal that several students at SCMS have been disciplined (usually with a suspension) for "merely" "having" cigarettes at school. Techmeier Aff., Exhibit 17. None of this is surprising, moreover, because it is unlawful for any person under the age of eighteen to purchase or *possess* tobacco products in the State of Wisconsin. W.S.A. § 254.92.

When Marinack learned that Tabitha might be in possession of tobacco products, he searched her locker, pursuant to the School District's policy authorizing such searches,[4] and discovered a pack of cigarettes. DPFOF, ¶¶ 9-10; PPFOF, ¶ 5. He then summoned Tabitha to his office, where he informed her that he had found the cigarettes and that she was going to be issued a three-day "out of school" suspension. PPFOF, ¶ 5. Marinack also left a message for Tabitha's mother at her place of employment, requesting that she return his call immediately. *Id.*, ¶ 6. At some point during her meeting with Marinack, Tabitha informed him that she had, earlier in the day, given her friend Timijane "a number of cigarettes," which he could probably find hidden in a sock in Timijane's locker. *Id.*

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[4] See Affidavit of Richard Hess, Feb. 13, 2001 ("Hess Aff. I")

At this juncture, which was towards the end of the school day, Marinack called Timijane out of her class and asked her if she had any cigarettes. DPFOF, ¶¶ 15-16; PPFOF, ¶¶ 7-8. Timijane replied that she did not. *Id.* Marinack then proceeded to search Timijane's locker, asking again whether she had any cigarettes and again receiving a denial. *Id.* Eventually, Marinack discovered a single cigarette inside a sock, consistent with the information Tabitha had provided. *Id.* Also inside Timijane's locker at the time, among her schoolbooks, was a library book entitled "After A Suicide" by Susan Kuklin. Marinack Dep., p. 63 [Techmeier Aff., Exhibit 2]. Marinack claims that he did not notice this particular book at the time he searched Timijane's locker for cigarettes. *Id.*

Upon discovering the cigarette in Timijane's locker, Marinack recalls informing Timijane that it was against school policy to possess tobacco products on school grounds and that she would receive a three-day suspension. DPFOF, ¶ 21. Timijane began to cry. *Id.*, ¶ 22. She returned to her classroom, which was located near her locker, to gather her belongings. *Id.*, ¶ 23. A classmate, Jamie Schoenholen, described Timijane as crying "a lot," *i.e.*, more than "soft... little tears." Schoenholen Dep., p. 24. Marinack and Timijane then returned to his office. DPFOF, ¶ 25. Marinack described Timijane's reaction to the discovery of the cigarettes and the news of the suspension as "normal" in light of the fact that Timijane was a middle school student who had not been in much trouble previously. Marinack Dep., p. 53 [Techmeier Aff., Exhibit 2]. On the way to Marinack's office, despite her tears, Timijane was apparently calm enough to inquire how she would receive her homework assignments during the suspension. DPFOF, ¶ 25.

Kathy Mailahn, a school secretary, says that Timijane was not crying when she arrived in the school offices with Marinack. Deposition of Kathy Mailahn ("Mailahn Dep."), p. 15 [Heidenreich Aff., Exhibit 13]. Brianna Seefeldt ("Brianna"), a student who was present in the office, recalls that Timijane was crying as she entered the office. Deposition of Brianna Seefeldt ("Seefeldt Dep."), p. 23 [Techmeier Aff., Exhibit 12]. According to Brianna, Marinack raised his voice upon entering and said "pretty harsh[ly]" to Timijane that she needed to go into his office and sit down. *Id.*, pp. 24-25. Brianna could also see and hear Timijane crying "heavily" during the meeting, because the door to Marinack's office was open. *Id.*, p. 28. However, Brianna did not hear Marinack raise his voice again during the meeting. *Id.*, p. 33. Tabitha does not recall that Marinack ever raised his voice that afternoon. Reiter Dep., p. 14

In the meeting, which appears to have been a brief one, Marinack says that he informed Timijane and Tabitha that they were not in serious trouble and would only be suspended for three days (instead of five) because they had been good kids in school and had generally stayed out of trouble. DPFOF, ¶¶ 27-28. According to Tabitha, Timijane was crying hard at this point, but was neither sobbing nor hysterical. *Id.*, ¶ 29. Consistent with Tabitha's recollection, Marinack says that while Timijane was crying on and off from the time he searched her locker, she never became hysterical or irrational or hyperventilated in his presence. Marinack Dep., pp. 65-66 & 75 [Heidenreich Aff., Exhibit 2]; *see also* Marinack Statement to Police ("Marinack Statement"), pp. 2-3 [Techmeier Aff., Exhibit 3].

At 2:28 PM, while the meeting with the two girls was still in progress, Tabitha's mother returned Marinack's earlier phone message and requested that her daughter be kept at the school until she could pick her up around 4:00. Marinack Statement, p. 3; DPFOF, ¶ 33. While Marinack was on the phone with Mrs. Reiter, the 2:30 bell rang, signaling the end of the school day. DPFOF, ¶ 34. According to Marinack, as the meeting and the school day were ending, Timijane informed him that she needed to catch the bus for home. Marinack Dep., p, 72; Marinack Statement, p. 3. Because of the time, Marinack was apparently uncertain whether to call Timijane's mother or simply let her go home on the bus. However, since the school day was over and Timijane had volunteered that her father would come to Marinack's office the following day to discuss the suspension, Marinack decided not to contact either of Timijane's parents at their places of employment, as he had done earlier in Tabitha's case. Marinack Dep., p. 72 [Techmeier Aff., Exhibit 2]. He was confident that he would be able to talk to a parent "at least the following day." *Id.* When Timijane left Marinack's office to board the bus, she was still crying. *Id.*, p. 75. However, Marinack did not find her emotional state sufficiently alarming to consult either the school psychologist or the school social worker, both of whom were at the school that afternoon. PPFOF, ¶ 73. According to Marinack:

> She was crying, yeah, tears were coming down. The reaction wasn't any different from the time I met her at the locker other than walking her back in the office and there is [sic] times when I asked her questions and stuff and she wasn't crying, she answered the questions. My dad is coming, how do I get the

> homework. So there - she was very rational throughout the whole thing.

Marinack Dep., p. 75 [Techmeier Aff., Exhibit 2].

Ms. Mailahn, a mother of three daughters, again observed Timijane as she left the Assistant Principal's office. Although Timijane was crying "hard enough... to hear," she was not, according to Ms. Mailahn, "hysterical." Mailahn Dep., p. 17. Another secretary in the office, Mary Conradt, recalls that Timijane was "kind of crying, sniffling like" as she passed the counter on her way out of the offices. Deposition of Mary Conradt ("Conradt Dep."), p. 13 [Heidenreich Aff., Exhibit 14].

Several classmates who observed Timijane after she left the meeting with Marinack (but before she boarded the bus) recall that she was distraught. PPFOF, ¶ 18. Andrea Kramer described Timijane as beet red, crying very hard, hyperventilating, and hysterical. *Id.* She also said that Timijane had a confused, distant look. *Id.* Ashley Raeder ("Ashley"), one of Timijane's closest friends, also described Timijane as crying and hyperventilating. *Id.* According to Ashley, Timijane was concerned that her parents would ground her, in addition to the three-day suspension. DPFOF, ¶ 53. Brigitte Menard recalled Timijane gasping, shaking, and being unable to speak clearly, PPFOF, ¶ 18, but also testified that Timijane calmed down "somewhat" while in her presence. Deposition of Brigitte Menard ("Menard Dep."), p. 34 [Heidenreich Aff., Exhibit 6]. Jeremy Wood referred to Timijane's crying as sounding like a "mild wail." PPFOF, ¶ 18. One of the last people to see Timijane alive, her bus-driver on the ride home, observed that Timijane's eyes were

"red and glassy as if she had been crying." Statement of Sandra Carlson ("Carlson Statement"), p. 1 [Techmeier Aff., Exhibit 18].

Immediately after his meeting with Timijane and Tabitha, as he was going to "bus duty,"[5] Marinack had to break up a fight between two boys. Marinack Statement, p. 3. After this matter was resolved, but before attending another meeting or conference, Marinack placed a call to the Martins' home answering machine. *Id.* In the message, as described later by Mrs. Martin, "Marinack explained that Timijane had gotten into some trouble that day at school, that she had been caught with some cigarettes and that she was being suspended from school for three days and that I needed to come down to the school and speak with him." C. Martin Dep., p. 63.

When Mrs. Martin arrived home from work, slightly before 4:00 PM, she received Marinack's message. *Id.,* pp. 61-62. She proceeded first to an athletic park near the school, because Timijane had planned to attend softball practice there after school. *Id.,* p. 71. When Mrs. Martin did not see her daughter at the ball field, she next drove to the school, where she encountered Marinack in the parking lot. *Id.*, pp. 71-72.

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[5] Although plaintiffs' counsel apparently never questioned Marinack on this point during his deposition, they now suggest that Marinack may have seen Timijane while performing *"bus* duty," at which time, they argue, he may have observed her in the emotionally overwrought state described by some of her friends. Beyond Marinack's reference to bus duty, there is no evidence placing Timijane in Marinack's presence following the meeting. As noted, Marinack says that Timijane never became hysterical or irrational or hyperventilated in his presence.

Marinack explained, as he had to Timijane, that he had settled on a three day suspension because Timijane was a "good kid." *Id.* Mrs. Martin stated that Tabitha was a "bad influence" on her daughter. *Id.*. According to Marinack, Mrs. Martin also mentioned that she had caught Timijane smoking in the past. Marinack Dep., p. 70 [Heidenreich Aff., Exhibit 2]. She appeared both upset and angry with her daughter. *Id.* When Mrs. Martin learned that Timijane had taken the bus home, she "got in [her] car and drove off." C. Martin Dep., p. 77. Mrs. Martin was "concerned" that her daughter had taken the bus home - "because she was supposed to be at softball practice" - but she was not concerned that her daughter might harm herself. *Id.*, p. 84.

Upon returning home, Mrs. Martin discovered her daughter. She called an ambulance at 4:43 PM, but paramedics were unable to revive Timijane. Techmeier Aff., Exhibit 19. Timijane was pronounced dead at 5:25 PM at the Shawano Medical Center. *Id.*

Additional material facts will be discussed below, especially as they relate to the plaintiffs' procedural due process and equal protection claims and their argument that the school and school district had inadequate suicide prevention measures in place at the time of Timijane's death.

ANALYSIS

I. Summary Judgment Standard

The standards governing motions for summary judgment are well established. Pursuant to Rule 56(c):

> summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)(citing Fed.R.Civ.P. 56(c)). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Id.*, at 327. Summary judgment "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Oates v. Discovery Zone,* 116 F.3d 1161, 1175 (7th Cir. 1997) (citations and internal quotations omitted). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex,* 477 U.S. at 322. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). While a *material* fact is one that is "outcome determinative under the governing law," *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 392 (7th Cir. 1990), a *genuine* issue as to that material fact is raised only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248.

The question whether a material issue of fact is *genuine* necessarily requires "some quantitative determination of sufficiency of the evidence." Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 186 (1987). "Of course, a court still cannot resolve factual disputes that could go to a jury at trial, . . . [b]ut no longer need the trial court leave every sufficiency issue for trial or a later directed verdict motion." *Id.* "A district judge faced with [a summary judgment motion] must decide... whether the state of the evidence is such that, if the case were tried tomorrow, the plaintiff would have a fair chance of obtaining a verdict. If not, the motion should be granted and the case dismissed." *Palucki v. Sears, Roebuck & Co.,* 879 F.2d 1568, 1572-73 (7th Cir. 1989)(citations omitted). Thus, a party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "[A] party must produce 'specific facts showing that there remains a genuine issue for trial' and evidence 'significantly probative' as to any [material] fact claimed to be disputed." *Branson v. Price River Coal Co.,* 853 F.2d 768, 771-72 (10th Cir. 1988). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,*

477 U.S. at 249-50. Such principles insure that summary judgment is utilized "when it can be shown that a trial would serve no useful purpose." *Windham v. Wyeth Laboratories, Inc.*, 786 F. Supp. 607, 610 (S.D.Miss. 1992).

II. Section 1983

Section 1983 provides a remedy for the deprivation of rights, privileges or immunities conferred by the Constitution or laws of the United States. 42 U.S.C. § 1983. The analysis of plaintiffs' claims begins with the acknowledgment that Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. *Albright v. Oliver*, 510 U.S. 266, 271(1994). Thus, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Haines v. Fisher*, 82 F.3d 1503, 1508 (10th Cir. 1996). At the heart of this lawsuit is the plaintiffs' claim that the defendants failed to discharge constitutional duties imposed by the Fourteenth Amendment, which provides that no State may deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV (1868). As discussed below, the plaintiffs' due process claim has both a procedural and a substantive component.

III. Plaintiffs' Municipal and "Official Capacity" Claims Do Not Survive Summary Judgment Because The Record Fails To Establish A Policy or Custom Reflecting "Deliberate Indifference" To The Risk Of Suicide[6]

Under Section 1983, a municipal defendant may not be held liable for the conduct of its employees on a theory of *respondeat superior*. *Bryan County v. Brown,* 520 U.S. 397, 403 (1997). Instead, liability must be established, if at all, on the basis of a policy or custom that is causally related to the plaintiff's injury. *Id.* Additionally, if SCMS and SGSD are to be held liable under Section 1983, the plaintiffs must show that the policy or custom reflects "deliberate indifference" to the risk of student suicide. *Id.* The *absence* of a policy can also give rise to liability, but, again, only if having no policy reflects deliberate indifference. *Cornfield v. Consolidated High School Dist.,* 991 F.2d 1316, 1327 (7th Cir. 1993).

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[6] Plaintiffs have sued Superintendent Richard Hess, Assistant Superintendent William Matthias, Principal Jeanne Cronce and Assistant Principal Marinack in their official as well as their individual capacities. However, "[a]n official capacity suit is the same as a suit against the entity of which the officer is an agent." *DeGenova v. Sheriff of DuPage County,* 209 F.3d 973, 974 n. 1 (7th Cir. 2000) (citing *McMillian v. Monroe County,* 520 U.S. 781,785 n. 1 (1997)). When faced with actions alleging both municipal and official capacity claims, the latter are properly dismissed as redundant. *Smith v. Metropolitan School Dist.,* 128 F.3d 1014, 1020 n. 3 (7th Cir. 1997), *cert. denied,* 524 U.S. 951 (1998).

The plaintiffs claim that if "the school had [not] done such an outrageously poor job on suicide prevention," Timijane would have been better able to "cope." Plaintiff's Brief, p. 17. Leaving the speculative nature of this assertion to one side, the Court will consider the plaintiffs' characterization of the suicide prevention measures in place at the time of Timijane's death. Students at SCMS received education designed to address suicide (either directly or indirectly) in the fifth, sixth and eighth grades, though apparently not in the seventh. DPFOF, ¶ 67. A social worker and a school psychologist were available at SCMS to counsel students referred to them because of concerns about the risk of suicide. *Id.*, ¶ 68. The school district had a written policy regarding suicide, albeit one that focused more on *responding* to suicide rather than preventing it. DPFOF, ¶ 69; Hess Aff. I, Exhibit 4; *see also* Deposition of Jeanne Cronce ("Cronce Dep."), p. 162-163 [Affidavit of Melissa L. Biedlingmaier (Biedlingmaier Aff.), Exhibit 3]. Staff also received training at the beginning of each school year designed to assist them in identifying students at risk for suicide. DPFOF, ¶ 70.[7] At the beginning of the 1997 school year, an outside counselor named Gary Swenson gave a presentation to middle and high school staff concerning suicide, *Id.*, ¶ 71. Swenson gave a

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[7] The plaintiffs try to dispute this fact by asserting, unconvincingly, that there is "no paper trail regarding agenda or attendance." Plaintiff's Additional Facts to Defendants' Proposed Findings of Fact, p. 14. Similarly, they complain that there is no extant "roster of attendance" for the presentations given by Swenson. *Id.*

similar presentation to the staff, parents and students at SCMS on March 17, 1998. *Id.*, ¶ 73.

These measures do not add up to deliberate indifference on the part of the school or the school district. If anything, they establish a policy of concern and solicitude for the problem of teen suicide. It is relatively easy, with the benefit of hindsight, to find fault with the school and the school district for not "doing enough." However, this Court's role is not to dictate the specific suicide prevention measures that are appropriate in a particular school or community *(e.g.*, mandating a hot-line, as suggested by the plaintiffs). These are matters for the school board. As long as the municipal defendants did not have a policy or custom of deliberate indifference to the risk of suicide, they are insulated from liability under Section 1983. The evidence in this record suggests the very opposite of indifference. Accordingly, neither SCMS nor SGSD may be held liable under Section 1983 in connection with Timijane's suicide.

IV. The Defendants Did Not Deprive Timijane or Her Parents Of Their Constitutional Rights

Summary judgment is also appropriate with respect to all defendants because no constitutional deprivations occurred in connection with the discipline of Timijane Martin on the afternoon of May 19, 1999.

A. Substantive Due Process

In defining the scope of duties imposed by the "substantive" component of the due process clause, judicial restraint requires this Court to exercise "the utmost care"

because "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended." *Collins v. City of Harker Heights,* 503 U.S. 115, 125 (1992). Notwithstanding the dearth of guidance in this often murky area, some reasonably clear "guideposts" emerge from the Supreme Court's landmark decision in *DeShaney v. Winnebago,* 489 U.S. 189 (1989). In *DeShaney,* social workers and other local officials received complaints indicating that the plaintiff was being physically abused by his father. Despite these complaints, the social workers and local officials did nothing to remove the plaintiff from his father's custody, and the plaintiff was eventually beaten so badly that he suffered severe, permanent injuries. The plaintiff sued the social workers and other officials involved, claiming that they deprived him of his due process rights under the Fourteenth Amendment by failing to protect him from his father's abuse. The Supreme Court, stating that such claims sound in substantive due process, held that state actors have no constitutional duty to protect their citizens from private acts of violence:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do

not come to harm through other means. Nor does history support such an expansive reading of the constitutional text. Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression," .... Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes.

Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual .... "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference ..., it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." ... If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's

> failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

Id., 489 U.S. at 195-97 (citations omitted). The Supreme Court recognizes only two exceptions to the foregoing rule. The first applies "when the State takes a person *into its custody* and holds him there against his will, [such that] the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.*, 489 U.S. at 199-200 (citation omitted) (emphasis added). The second is where the State "creates the danger or renders a person more vulnerable to an existing danger." *Stevens v. Umsted,* 131 F.3d 697, 701 (7thCir. 1997) (citing *DeShaney,* 489 U.S. at 198-201).

The plaintiffs argue that the custodial or "special relationship" exception applies here by virtue of Wisconsin's compulsory school attendance laws. Plaintiff's Brief, pp. 18-19. The Supreme Court has come close to rejecting this argument, albeit in *dicta. See Vernonia Sch. Dist. v. Action,* 515 U.S. 646, 655 (1995) ("[W]e do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect.'"). Every federal appellate court to consider the question, including the Court of Appeals for the Seventh Circuit, has expressly rejected the argument. *J.O. v. Alton Community Unit Sch. Dist. 11,* 909 F.2d 267, 272-73 (7th Cir. 1990); *see also Armijo v. Wagon Mound Pub. Sch.,* 159 F.3d 1253, 1261 (10th Cir.1998); *Wyke v. Polk County Sch. Bd.,* 129 F.3d 560, 569 (11th Cir.1997); *Dorothy J. v. Little Rock Sch. Dist.,* 7 F.3d 729, 732 (8th Cir. 1993); *D.R. v. Middle Bucks Area Vocational Tech. Sch.,* 972 F.2d 1364,

1370-73 (3d Cir.1992) (en banc), *cert. denied,* 506 U.S. 1079 (1993).

Indeed, the Seventh Circuit made it quite clear in *Alton Community, supra,* that a public school student is not in a "custodial" or special relationship with his school. In *Alton Community,* the plaintiffs were public school students who had been sexually molested by one of their teachers, and they sued the school district and school administrators under the Due Process Clause for failing to protect them from such abuse. The Seventh Circuit dismissed this claim, holding that, even in States where school attendance is compulsory, students are not in the "custody" of the State and are not held in school "against their will," at least not for purposes of imposing upon the State a constitutional duty to protect them from harm by others:

> Unfortunately for the plaintiffs, the due process clause is not "a guarantee of certain minimal levels of safety and security." Both this court and the Supreme Court have repeatedly rejected attempts to read the fourteenth amendment's due process clause as an affirmative charter of governmental duties. Only where the state has exercised its power so as to render an individual unable to care for himself or herself may an affirmative duty to protect that individual arise. But beyond the case of incarcerated prisoners and involuntarily committed mental patients, the Supreme Court has never recognized such a duty.

> We do not suggest that prisoners and mental patients are an exhaustive list of all persons to whom the state owes some affirmative duties, but the government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises. Whatever duty of protection does arise is best left to laws outside the Constitution, as Illinois has done.
>
> At most, the state might require a child to attend school, . . . but it cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child. By mandating school attendance for children under the age of sixteen, the state... has not assumed responsibility for their entire personal lives; these children and their parents retain substantial freedom to act. The analogy of a school yard to a prison may be a popular one for school-age children, but we cannot recognize constitutional duties on a child's lament. Schoolchildren are not like mental patients and prisoners such that the state has an affirmative duty to protect them.

Alton Community, 92 F.3d at 272-73.[8]

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[8] The law of this Circuit is very clear that school administrators do not have a custodial or "special relationship" with students that requires them to guarantee students' safety and well-

The decisions cited above recognize that, in contrast with prisoners and involuntarily-committed mental patients, "school children are not captives of the school authorities and the basic responsibility for their care remains with their parents." *Hasenfus v. LaJeunesse,* 175 F.3d 68, 71 (1st Cir. 1999). This is particularly true, of course, after school hours. Because Timijane took her life at home, *after* the school day had ended, it would be especially problematic to recognize a duty on the part of the school to guarantee her safety. In this regard, the *Armijo* case, *supra,* is directly on point. In that case, a troubled young man, Philadelfio Armijo, was suspended by the school principal and driven home by a school counselor, after which he committed suicide. The Tenth Circuit held that any "custodial" relationship which may have existed between the school and Armijo "ended once Armijo exited the car and ran to his house because at that point he was no longer under any involuntary restraint by a school official." *Armijo,* 159 F.3d at 1261-62. The same principle applies here. To recognize the existence of a custodial or special relationship on the facts presented in Timijane's case would greatly expand the relevant exception to *DeShaney* and go well beyond even the (few) precedents cited in the plaintiffs" brief, which at least involved incidents that occurred during the school day. *See, e.g., Waechter v.*

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being. *Alton Community, supra.* For the plaintiffs to argue otherwise, on the basis of pure *dicta* in *Nabozny v. Podelesny,* 92 F.3d 446, 459 n. 13 (7th Cir. 1996), is insupportable. Plaintiff's Brief, p. 19.

School Dist. No. 14-030, 773 F.Supp. 1005, 1009 (W.D. 1991).[9]

According to the Seventh Circuit, in addition to the "custodial" or "special relationship" exception, *"DeShaney* leaves the door open for liability in situations where the state creates a dangerous situation or renders citizens more vulnerable to danger." *Umsted,* 131 F.3d at 704[10] While the precise contours of the "state-created danger exception" have not been delineated by the Seventh Circuit, it is clear that in order to establish a substantive due process violation under

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[9] If the Court were to recognize the existence of a "special relationship" in this case (contrary to existing precedent), the defendants' conduct would presumably be measured according to a standard something like the one that *has* been developed in prison suicide cases. However, *as* the First Circuit recently observed, even under this *"plaintiff-friendly"* standard, "courts have been very reluctant to find prison guards liable for failing to prevent suicide unless confronted with specific imminent threats." *Hasenfus,* 175 F.3d at 71. As the discussion below makes clear, the record will not support a finding that school officials were "aware of a substantial risk of serious injury to [Timijane] but nevertheless failed to take appropriate steps to protect [her] from a known danger." *Frake,* 210 F.3d at 782; *see also Henderson v. Sheahan,* 196 F.3d 839, 845 (7th Cir. 1999), *cert. denied,* 530 U.S. 1244, 120 S.Ct. 2691 (2000).

[10] The basis for the "danger creation exception" is rather tenuous, as the First Circuit recently pointed out. *Hasenfus,* 175 F.3d at 73 n. 3. The exception is based on language in *DeShaney* pointing out that the State in that case "played no part in creating" the danger to Joshua DeShaney from his abusive father. 489 U.S. at 197.

this exception the plaintiffs must show "some *affirmative* act on the part of the state that either created a danger to [Timijane] or rendered [her] more vulnerable to an existing danger." *Id.* (emphasis in original). The defendants did not "create" a danger through any of their alleged *omissions, e.g.*, by having an inadequate suicide prevention policy or by failing to refer Timijane to a school counselor on the afternoon of May 19, 1999. These omissions may constitute common law negligence, but, as the Supreme Court pointed out in *DeShaney,* the due process clause "does not transform every tort committed by a state into a constitutional violation." 489 U.S. at 202.

Arguably, however, the "affirmative" acts of suspending Timijane and then "sending" her home alone "created" a risk of suicide, or at least rendered Timijane more vulnerable to an existing risk. To assess this proposition, the Court is guided by the six-part test articulated by the Tenth Circuit in *Armijo*[11]. Under this test, the plaintiffs must establish that:

> (1) Timijane was a member of a limited and specifically definable group;
>
> (2) Defendants' conduct put Timijane at a *substantial risk* of serious, immediate and proximate harm;

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[11] The *Armijo* test has not been adopted by the Seventh Circuit, and will not be followed slavishly here. However, the Court agrees with the parties that *Armijo* provides a useful analytical framework for considering whether the danger-creation exception applies.

(3) The risk was *obvious or known;*

(4) Defendants acted *recklessly* in *conscious disregard* of that risk;

(5) Defendants' conduct *"shocks the conscience"* and

(6) Defendants must have *created* the danger or increased Timijane's vulnerability to it in some way.

Armijo, 159 F.3d at 1262-63 (emphasis added).

Taking these factors in reverse order, the Court first notes that the defendants "could not have *created* a danger that already existed." *Id.* (emphasis added). The evidence in this case is fairly strong that Timijane faced a risk of suicide *before* the cigarette in her locker was ever discovered. To conclude otherwise, a jury would have to disbelieve the testimony of Tabitha Reiter that Timijane expressed suicidal thoughts in phone conversations, in a letter, and during the lunch hour on May 19, 1999. But why would Tabitha lie about Timijane's comments, or her own failure to bring them to the attention of school authorities? The awful candor of Tabitha's testimony belies any claim that it is fabricated, and indeed the plaintiffs offer no reason why it should be regarded as unreliable.

There remains the possibility that the defendants increased Timijane's vulnerability to an existing risk, but - as the other factors in *Armijo* make clear - such a risk would have to have been "known or obvious" to give rise to liability.

In contrast with *Armijo,* where the student twice expressed suicidal thoughts to a school aide, there is no evidence that the defendants in this case had actual knowledge of the risk of suicide. In the Court's judgment, moreover, it would be impossible for a reasonable jury to conclude that such a risk was "obvious." Although the plaintiffs argue that Marinack had "knowledge that Timijane was reading a book on suicide," Plaintiff's Brief, p. 3, Marinack denies seeing the book *After A Suicide* when he searched Timijane's locker. His testimony on this point is both uncontradicted and, in a sense, irrefutable, since the only other witness to the locker search is now deceased. Marinack has testified that Timijane was crying and upset during the meeting in his office, but not hysterical. Tabitha and the two school secretaries corroborate this account. The plaintiffs argue that Marinack's own reference to bus duty creates an issue of fact as to whether he *may* have seen her in the emotionally overwrought state described by some of her friends. However, in opposing summary judgment, the plaintiffs have not come forward with any evidence that places Timijane in Marinack's presence at any time after she left his office. *See* n. 5 *supra.* For purposes of summary judgment, therefore, it is proper to assume that Timijane was crying but not hysterical while in Marinack's presence. In Marinack's experience with middle school students, especially those who had not previously been in much trouble, such a response to being suspended from school was normal. His opinion in this regard, as an experienced school administrator, is entitled to some deference from this Court.

Lastly, the Court notes that in this context the *sine qua non* of a substantive due process violation is conduct that "shocks the conscience." *Hasenfus*, 175 F.3d at 72 (citing

County of Sacramento v. Lewis, 523 U.S. 833, 848-49 (1998) and *Rochin v. People of California,* 342 U.S. 165, 172 (1952), *overruled on other grounds by Mapp v. Ohio,* 367 U.S. 643 (1961)). To be conscience-shocking, a defendant's conduct must be "outrageous, uncivilized, and intolerable." *Id.* As the First Circuit noted in *Hasenfus,* cases finding liability on the basis of conscience-shocking behavior are quite rare, and by definition involve egregious facts, as in the recent case of a police officer who pulled a woman over for speeding and then proceeded to rape her. *Rogers v. City of Little Rock,* 152 F.3d 790 (8th Cir. 1998). While the exact definition of "conscience-shocking" can be elusive, *Lewis,* 523 U.S. at 847,[12] the concept usually refers to manifestly outrageous conduct that is certain to cause harm, as in the example just given. The "conscience-shocking" requirement is intended to prevent substantive due process analysis from supplanting tort law. As Justice Souter, writing for the majority in *Lewis*, explained:

> It should not be surprising that the constitutional concept of conscience shocking duplicates no traditional category of common-law fault, but rather points clearly away from liability, or clearly toward it, only at the ends

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[12] Justice Scalia has been a consistent and cogent critic of the "shocks the conscience" test, which, because of its subjectivity, he regards as an invitation to "judicial governance." *Lewis,* 523 U.S. at 861-65 (Scalia, J., concurring in the judgment). Borrowing from Cole Porter, Justice Scalia has described the test as "the *ne plus ultra,* the Napoleon Brandy, the Mahatma Ghandi, the Cellophane of subjectivity." *Id*

> of the tort law's spectrum of culpability. Thus, we have made it clear that the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm. In *Paul v. Davis,* 426 U.S. 693 (1976), for example, we explained that the Fourteenth Amendment is not a "font of tort law to be superimposed upon whatever systems may already be administered by the States," and in *Daniels v. Williams,* 474 U.S. [327], 331 [1986], we reaffirmed the point that "[o]ur Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have accordingly rejected the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct, and have held that the Constitution does not guarantee due care on the part of state officials; *liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.*

Lewis, 523 U.S. at 848-49 (emphasis added).

Conscience-shocking behavior was not present in this case. Even if the Court assumes that Marinack saw the book about suicide and observed Timijane "hyperventilating" and "hysterical" as she waited for the bus, his conduct was at worst negligent, but it was not "conscience-shocking." Again,

a comparison with *Armijo* is instructive. In *Armijo,* school authorities sent the decedent home alone, during the school day, knowing that (1) he "had psychological and emotional problems, including impulsivity and depression," (2) he had talked about suicide with a school aide, and (3) he had access to firearms in his parents' home. *Armijo,* 159 F.3d at 1256. As discussed above, the Tenth Circuit rejected the existence of a custodial or "special" relationship because the decedent, like Timijane, took his life at home. However, the *Armijo* court remanded the plaintiff's "danger-creation" theory for trial (with respect to two individual defendants), holding that the defendants' behavior could *"possibly...* be construed as conscience-shocking, depending on context as determined after a full trial." *Id.* at 1264 (emphasis added).[13] While the facts in *Armijo* can plausibly be regarded as conscience-shocking, the same is not true of the facts in this case, even when they are viewed in the light most favorable to the plaintiffs. Timijane was not a troubled student, she had never talked to school authorities about suicide, and she did not, as far as the defendants were aware, have access to any dangerous weapons at home.

For all of these reasons, but principally because their behavior fails to shock the conscience, the defendants may not be held liable for "creating" a danger of suicide to Timijane. As a matter of law, no custodial or "special relationship"

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[13] As the First Circuit noted in *Hasenfus,* the *Armijo* decision lies "at the outer limit" in terms of recognizing potential liability under a "danger-creation" theory. *Hasenfus,* 175 F.3d at 74.

existed between the school and Timijane. *Alton Community, supra.* Thus, the facts of this case do not take it outside of the general rule in *DeShaney,* and recovery is barred on a substantive due process theory.

B. *Procedural Due Process*

The plaintiffs claim that the defendants denied Timijane and her parents their rights to procedural due process by (1) failing to provide adequate notice that possession of tobacco would result in suspension, and (2) failing to provide adequate notice of Timijane's suspension or an opportunity to be heard regarding the same. The first of these arguments makes much of the fact that the SCMS and SGSD policies regarding tobacco smoking and use, respectively, did not *specifically* mention *possession* as a punishable offense. Thus, potential violators of the policy against "mere possession" lacked sufficient notice of the likely penalty. Legalistic hair-splitting of this kind has become all too common in our culture and in our courts. *See, e.g.*, William Safire, *Multiple Meanings of "Depose,"* Springfield State Journal-Register, Jan. 22, 1999 (noting, in the context of President Clinton's impeachment proceedings, that "artful lawyering can cast doubt on any set of facts."). Indeed, if the "use versus possession" argument were the plaintiffs' only due process claim, the Court would dismiss it with the observation that "[s]omething has gone badly wrong when the scarce judicial resources of the federal courts are brought to bear on a [claim] which has so little merit... *"Smith v. Severn,* 129 F.3d 419, 430 (7th Cir. 1997). The Court agrees with the defendants that "[e]ven a conservative interpretation of the policies would lead a reasonable person to believe that if smoking on school grounds [was] prohibited, then possessing

tobacco on school grounds would be prohibited as well." Defendant's Reply Brief, p. 2. Indeed, the students at SCMS appear to have had little difficulty understanding that "mere possession" was against the rules and would result in suspension. Schoenholen Dep., p. 8. It is certainly also relevant that state law forbids the possession of any amount of tobacco by minors. W.S.A. § 254.92. For all of these reasons, and because Section 1983 does not permit "the proper construction of school regulations" to be litigated in federal court, *Wood v. Strickland,* 420 U.S. 308, 325 (1975), the plaintiffs' "use versus possession" argument fails to survive summary judgment.

In considering the plaintiffs' remaining procedural due process arguments, and their other constitutional claims, the Court is mindful that "[t]he system of education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members and Section 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees." *Id.*

In the context of school discipline, the Fourteenth Amendment does require that students who are suspended for ten days or less be afforded "minimal due process," meaning simply notice and an opportunity to be heard. *Severn,* 129 F.3d at 428 (discussing *Goss v. Lopez,* 419 U.S. 565 (1975)). Consistent with these "minimal" requirements (and perhaps going beyond them a bit for purposes of state law) the district's policy on "student due process rights" provides:

> Before any disciplinary action such as expulsion or suspension is taken against a student, the student has a right to the due process guaranteed him/her by state law. Any student accused of an action and threatened with punishment for this action shall:
>
> 1. Be advised of the reason for the disciplinary action.
>
> 2. Have the right to explain his/her actions or his/her side of the allegations.
>
> 3 Have his/her parent(s) or guardian notified if under eighteen and/or living at home; and
>
> 4. Have a right to a hearing before the district administrator and/or Board, with the student's parent(s), legal counsel, or guardian present if desired.

Affidavit of Richard Hess, May 25, 2001 ("Hess Aff.II"), Exhibit 1.[14]

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[14] The rules printed in the student handbook also state that "[p]arents will be notified of disciplinary action resulting in an out-of-school suspension and will be expected to pick up their child from school following the notification." Techmeier Aff., Exhibit 1, p. 13.

As previously discussed, Timijane was on notice regarding tobacco smoking and its "lesser included offense," possession. Marinack explained to Timijane the reasons for the three-day suspension at her locker, immediately after finding the cigarette. He explained them again during the meeting in his office. Timijane had an opportunity to present her side of the story during the meeting. Indeed, she claimed to have been holding the cigarette for someone else. Marinack Dep., p. 49 [Heidenreich Aff., Exhibit 2]. Marinack thought that this consideration was irrelevant, as he also explained to Timijane. As for parental notification, it is true that Marinack did not call either of Timijane's parents at work, as he had done earlier in the day in Tabitha's case. However, it was the end of the school day by the time Timijane's case came to his attention, and in any event Marinack *did* leave a message on the Martins' home answering machine. Timijane had also assured him that her father would be available to discuss the matter the following day. Marinack apparently did not regard Timijane as the kind of kid who would either conceal the matter from her father or delete messages concerning the suspension from the answering machine. *Id.*, p. 83. Of course, Mrs. Martin did have an opportunity to discuss the matter with Marinack in the parking lot as he was leaving work, and she seems not to have disputed the fairness of the discipline at that time. Timijane's death foreclosed any further discussion, hearings and/or appeals. It therefore seems particularly pointless to dwell on the alleged deprivation of "appeal rights." In short, the record fails to establish that Marinack's handling of the matter deprived Timijane, or her parents, of the "minimal" process that is due when a student is suspended for ten days or less. *Severn,* 129 F.3d at 428. Timijane was put on notice of the conduct that was deemed improper, she was presented with the evidence against her,

and she was allowed to tell her side of the story. In light of the penalty involved, due process required nothing more. *Id.* at 429.

C. Equal Protection

The gist of the plaintiffs' equal protection claim is that the defendants failed to discipline Timijane in exactly the same way that they disciplined other students, including her friend Tabitha, for possession of tobacco. In their brief, the plaintiffs claim that Marinack "directed Timijane down the path that led to her death when he chose to treat her differently than Tabitha." Plaintiffs' Brief, p. 2. Absent either a fundamental right or a suspect criterion, a disciplinary action challenged on equal protection grounds need only have a "rational basis." *Severn,* 129 F.3d at 429. Under the "rational basis" test, school discipline "is entitled to a presumption of validity" and will not be overturned as long as it is "rationally related to a governmental interest." *Id.* However, before even this low level of constitutional scrutiny is triggered, there must be a showing that similarly-situated individuals have in fact been treated differently. *Id.* The Court is not satisfied that the plaintiffs have made this showing.

The basis for asserting that Tabitha and Timijane received differing punishment is an affidavit from Mrs. Martin, submitted by the plaintiffs in response to the defendants' motion for summary judgment. During her deposition, more than a year ago, Mrs. Martin was asked about Marinack's phone message and about her subsequent conversation with him in the school parking lot. Mrs. Martin made no mention of any discipline other than the three-day suspension. In her affidavit, dated April 26, 2001 and

submitted as part of the summary judgment record, Mrs. Martin claims that Marinack told her that Timijane would *also* be barred from a going on a field trip and from participating in the first three volleyball games of the Fall 1999 season. Affidavit of Charla Martin ("C. Martin Aff.") [Techmeier Aff., Exhibit 29]. A party may not create a question of material fact, and thus forestall summary judgment, by submitting an affidavit that contradicts her own sworn statements in a deposition. *Buckner v. Sam's Club,* 75 F.3d 290, 292 (7th Cir. 1996). Mrs. Martin's supplemental affidavit would be acceptable if it merely clarified ambiguous or confusing deposition testimony. *Id.* Clearly, however, the affidavit is a last-minute attempt to patch holes in the plaintiffs' equal protection claim. Since all of the other evidence in the record indicates that Tabitha and Timijane received *identical* punishment, the Court will proceed on this assumption and disregard the affidavit.

The plaintiffs' claim that Timijane committed a *less* serious offense than Tabitha rests on a distinction between possessing *one* cigarette versus ten, or fifteen, or twenty (or however many were found in Tabitha's locker). The Court refuses to open the door to equal protection claims based on such trivial distinctions. State law forbids minors from possessing *any* amount of tobacco. Therefore, Marinack was justified in disciplining Timijane *as severely as* Tabitha. The plaintiffs also maintain that Tabitha's mother received a call at the workplace, while neither of the Martins received such a call. However, as discussed above, this "difference" in treatment arose, not for any invidious or suspect reason, but because Marinack was dealing with Timijane's discipline at the end of the school day. Lastly, the plaintiffs claim that students elsewhere in the school district were treated more

leniently than Timijane with respect to tobacco possession. Within reason, school administrators must have some flexibility in fashioning remedies that are appropriate to particular students and specific infractions. Thus, relatively minor differences in discipline across a school district are to be expected and do not give rise to a federal equal protection claim.

D. Fourth Amendment

The plaintiffs assert that the search and seizure of the cigarette from Timijane's locker violated her rights under the Fourth Amendment, as incorporated against the states by the Fourteenth. The Court finds this argument unconvincing. The school's policy on locker searches, a copy of which Timijane ought to have received with her student handbook, was perfectly clear. Hess Aff. I, Exhibit 3. Pursuant to this policy, the school was entitled to search for contraband in Timijane's locker (which actually belonged to the school) "without notice, without student consent, and without a search warrant." *Id.* In this case, Marinack had reasonable suspicion justifying the search, in the form of credible information from Tabitha that he would find cigarettes in Timijane's locker.[15] In this context, the Fourth Amendment does not require

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[15] The plaintiffs go so far as to suggest that the cigarette found in Timijane's locker was planted there by another student, since students sometimes shared locker numbers (contrary to school policy). This remote possibility is hardly sufficient to undermine the "reasonableness" of Marinack's suspicion, which is established by his testimony and Tabitha's.

anything more. *See New Jersey v. T.L.O.,* 469 U.S. 325 (1985); *Cornfield,* 991 F.2d at 1320 ("reconciling the privacy interests of children with the needs of schools to maintain order does not require strict adherence to a probable cause standard for Fourth Amendment purposes").

V. Qualified Immunity

The plaintiffs' "individual capacity" claims against Marinack, Cronce, Matthias and Hess are governed by the doctrine of qualified immunity, which provides that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Baxter v. Vigo County School Corp.,* 26 F.3d 728, 737 (7th Cir. 1994) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The Supreme Court recently emphasized the importance of "resolving [qualified] immunity questions at the earliest possible stage in litigation," so as to spare those are entitled to immunity from having to stand trial or face the other burdens of litigation. *Saucier v. Katz,*___U.S.___, 121 S.Ct. 2151, 2155 (2001.)

The Supreme Court in *Saucier* also clarified the appropriate methodology for resolving a claim of qualified immunity. First, the Court must ask whether the facts, "taken in the light most favorable to the party asserting the injury," show that the defendant violated a constitutional right. *Id.* If this question is answered in the negative, *Saucier* teaches that *"there is no necessity for further inquiries concerning qualified immunity." Id.* (emphasis added). In other words, if even a generous view of the facts will not support the

conclusion that a constitutional right has been violated, it is unnecessary to ask whether the right was "clearly established" at the time of the incident giving rise to the claim. *Id.* The Court's summary judgment analysis, above, concludes that no constitutional violations took place in connection with the discipline of Timijane, even viewing the record in the light most favorable to the plaintiffs. It follows that the individual defendants are entitled to qualified immunity and should be dismissed from this action.

VI. Plaintiffs' Claims Under Title IX and Title VI

The defendants, in their memorandum in support of summary judgment, argue that they are entitled to judgment as a matter of law with respect to the plaintiffs' claims under Title IX and Title VI because there is "no basis" for claiming that Timijane was discriminated against on the basis of her sex or race. Defendant's Brief, p. 25. The plaintiffs, by not responding to this portion of the defendants' memorandum, have manifestly failed to meet their burden in opposing summary judgment as to these issues. It is not the Court's province to dream up reasons why these unsubstantiated (and apparently abandoned) claims should go to trial. They are, therefore, dismissed.

VII. Supplemental Jurisdiction

When all federal claims are dismissed before trial, the "general rule" is that "the district court should relinquish jurisdiction over the pendent state law claims rather than resolving them on the merits." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 727-28 (7th Cir.) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 727-728

(1966), *cert. denied,* 525 U.S. 870 (1998). In "unusual cases," it may be proper to retain jurisdiction, as when the statute of limitations has run so that the claims cannot be filed in state court. *Id.* The plaintiffs do not argue, nor does the record suggest, that this is such a case. Accordingly, the Court declines to exercise supplemental jurisdiction over the plaintiffs" pendent state law claims.

VIII. The Martins' Loss of Consortium Claim

Loss of consortium claims are properly dismissed when the constitutional claims upon which they depend no longer remain. *Schaeffer v. Goch,* 153 F.3d 793, 799 (7th Cir. 1998). In other words, when the underlying constitutional claims have been dismissed, as in this case, the loss of consortium claim drops out of the case as well. *Id.*

IX. Conclusion

The facts of this case are troubling. When a young person commits suicide, it is natural to ask whether something could or should have been done to prevent the incident from occurring. However, assigning blame in such cases is inherently problematic because youth suicide "has no single cause and no infallible solution." *Hasenfus,* 175 F.3d at 73. Parents, of course, have primary responsibility for safeguarding their children from this danger, but even concerned and involved parents are often helpless to prevent such tragedies. *Id.* Matters are not helped by destructive cultural forces in our society which devalue human life and create feelings of despair and worthlessness among our young people. *See generally* Steve Allen, *Vulgarians At The Gate* (Prometheus 2001). Schools and school administrators no less than parents, face a difficult task in dealing with the risk of

teen suicide. Perhaps there was negligence in this case, although Marinack's testimony suggests that the defendants lacked either actual or constructive knowledge of a risk of suicide and Tabitha's testimony raises significant questions concerning causation.[16] However, on the basis of the record before this Court, the defendants may not be held liable for violating rights conferred by the federal Constitution. As *DeShaney* makes clear, the due process clause of the Fourteenth Amendment "does not transform every tort committed by a state actor into a constitutional violation." 489 U.S. at 202. Nor does the Constitution require a State to protect its citizens from themselves except in very limited situations, and then only if the failure "shocks the conscience." Such facts are not present here. Likewise, for the reasons stated above, the record fails to support the plaintiffs' procedural due protection, or Fourth Amendment claims.

NOW THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Defendants' motion for summary judgment is GRANTED. The plaintiffs' federal claims are dismissed with prejudice; the plaintiffs" state law claims are dismissed without prejudice to the plaintiffs' ability to file them in state court.

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[16] Statutory immunity may shield the defendants from negligence claims. *See Wilson v. City of Milwaukee,* 138 F.Supp.2d 1126, 1129-30 (E.D. Wis. 2001) (discussing Wis. Stats. § 893.80(4)).

Dated at Milwaukee, Wisconsin, this 20th day of July, 2001.

SO ORDERED,

/s/_____
HON. RUDOLPH T. RANDA
U.S. District Judge

APPENDIX C

Wisconsin Statutes, Sec. 120.13(1)(b)3 provides:

Prior to any suspension, the pupil shall be advised of the reason for the proposed suspension. The pupil may be suspended if it is determined that the pupil is guilty of noncompliance with a school board rule or a rule adopted under subd. 1., or of the conduct charged, and that the pupil's suspension is reasonably justified. The parent or guardian of a suspended minor pupil shall be given prompt notice of the suspension and the reason for the suspension.

APPENDIX D

CHAPTER 94, Laws of 1973

AN ACT to amend 120.13(1) of the statutes, relating to suspension and expulsion of pupils from public schools.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Purpose and findings. The purpose of this act is to provide access to educational opportunity for pupils, to provide for the orderly operation of public elementary and high schools in this state, and to ensure fairness in the administration of school rules. The legislature finds that suspension of a pupil from school is for the purpose of bringing the pupil, his parent or guardian, teachers, counselors and school officials together to discuss and resolve the pupil's academic and disciplinary problems.

APPENDIX E

Shawano-Gresham School District Student Policy 441 provides:

STUDENT DUE PROCESS RIGHTS

Before, [sic] any disciplinary action such as expulsion or suspension is taken against a student, the student has a right to the due process guaranteed him/her by state law. Any student accused of an action and threatened with punishment for this action shall:

1. Be advised of the reason for the disciplinary action.

2. Have the right to explain his/her actions or his/her side of the allegations.

3. Have his/her parent(s) or guardian notified if under eighteen and/or living at home; and

4. Have a right to a hearing before the district administrator and/or Board, with the student's parent(s), legal counsel, or guardian present if desired.

LEGAL REF.: Section 120.13(1) Wisconsin Statutes
APPROVED: November 16, 1998

APPENDIX F

Shawano Community Middle School Student Handbook provides:

Out-of-School Suspension - A student will be issued an out-of-school suspension for severe or chronic misbehavior that warrants disciplinary action beyond a noon detention, after school detention or in-school suspension. The degree of severity will determine the length of the suspension.

A student will be issued an out-of-school suspension for severe misconduct and-or (sic) unsafe actions as outlined in the Honor Level Discipline Plan in conjunction with the Shawano Community Middle School Student Behavioral Plan.

Failure to comply with other types of disciplinary actions, such as after-school detentions or in-school suspension.

1. Fighting.
2. Vandalism.
3. Profanity.
4. Threats/Intimidation.
5. Drug or alcohol violations (as stated in District Policy).
6. Harassment.
7. Severe misconduct resulting in injury or harm to someone else.
8. Use/Possession of weapon or look-alike weapon.
9. Other.

Parents will be notified of disciplinary action resulting in an out-of-school suspension and will be expected to pick up their

child from school following the notification. An out-of-school suspension may be invoked for 1-5 days. Requirements for re-entry will be discussed with parents.

(2) (2) DEC 2 2002

Nos. 02-500 and 02-506

In the Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SHELL OIL COMPANY AND UNION OIL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States "arranged for disposal" of waste within the meaning of Section 107(a)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9607(a)(3), by virtue of its World War II regulation of the manufacture and purchase of a petroleum product when it did not direct or control the actual disposal of waste from that manufacture.

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In the Supreme Court of the United States

No. 02-500

ATLANTIC RICHFIELD COMPANY AND TEXACO, INC., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 02-506

SHELL OIL COMPANY AND UNION OIL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 294 F.3d 1045.[1] The orders of the district court issued on September 28, 1993 (Pet. App. 84a-107a), and August 11, 1998 (Pet. App. 57a-83a), are reported at 841 F. Supp. 962 and 13 F. Supp. 2d 1018. The

[1] References to "Pet. App." are to the appendix to the petition in No. 02-500.

orders of September 18, 1995 (Pet. App. 31a-47a), November 2, 1998 (Pet. App. 55a-56a), and October 12, 1999 (Pet. App. 48a-54a), are unreported.

JURISDICTION

The judgment of the court of appeals was initially entered on February 11, 2002. Petitions for rehearing were denied and a revised opinion was entered on June 28, 2002. Pet. App. 2a-3a. The petitions for a writ of certiorari were filed on September 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation concerns payment for the cleanup of the McColl Superfund Site in Fullerton, California. Petitioners Shell Oil Co., Union Oil Co., Atlantic Richfield Co., and Texaco, Inc. used the McColl site to dispose of acid waste they generated in manufacturing various petroleum products for sale to government and private purchasers during and after World War II. The district court held both petitioners and the United States liable as "arrangers" for the disposal of the waste but allocated the United States the responsibility to pay all of the cleanup costs. The court of appeals reversed in part and affirmed in part, holding as relevant here that the United States arranged for the disposal of only a portion of the waste and is responsible for only the costs relating to that portion.

1. Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9607, allows those who respond to releases or threatened releases of hazardous substances to sue certain persons for cost recovery. 42 U.S.C. 9607. Section 107(a) specifies the categories of potentially responsible parties:

> (1) the owner and operator of a * * * facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility * * * owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.

42 U.S.C. 9607(a). Liability under Section 107 is strict, with only certain limited defenses. 42 U.S.C. 9607(a)-(b).

Each responsible party is liable in contribution for costs incurred by other responsible parties. 42 U.S.C. 9607(a)(4)(B), 9613(f). Section 120(a)(1) of CERCLA provides in relevant part:

> Each department, agency, and instrumentality of the United States * * * shall be subject to, and comply with, [CERCLA] in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under [Section 107].

42 U.S.C. 9620(a)(1); see *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 10 (1989). Accordingly, the United States is sometimes subject to CERCLA claims.

2. a. By the early 1930s, petitioners began developing a specialized high-octane petroleum product for use in military and private aviation. Pet. App. 5a; Stip. 18-41 (L9-L13).[2] By the mid-1930s, they had negotiated contracts to sell this aviation gasoline, or "avgas," to the military and had begun discussing high-octane technology with the private aviation industry.[3] Stip. 19-28, 36, 39 (L9-L13). Through the onset of World War II, petitioners continued refining the technology and establishing the plants necessary for large-scale avgas production based on anticipated demand. Stip. 25-41, 123-136 (L10-L13, L30-L32).

Because avgas was critical to the war effort, the United States closely regulated its production during World War II. Pet. App. 6a; Stip. 4-6, 44 (L6, L14). In 1942, President Roosevelt established several agencies to oversee wartime production, including the War Production Board (WPB) and the Petroleum Administration for War (PAW). Pet. App. 6a; Stip. 42-91 (L13-L22). Under the nationwide priority rankings system, WPB regulated the flow of certain scarce goods. Pet. App. 6a; Stip. 52-55 (L15). PAW set national goals for the production of high-octane gasoline and set priorities on materials directly affecting the petroleum industry, such as avgas components and avgas itself. Stip. 17, 87-91 (L8-L9, L21-L22). Acting through such agencies, the United States had statutory authority to compel refin-

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[2] The parties agreed to 624 stipulated facts before the district court. Following the lead of petitioners Shell and Union in No. 02-506, references to a stipulation in this brief identify the number of the stipulation and the appropriate page of the material they lodged with this Court.

[3] Petitioners Shell and Union err in stating that avgas "was a wartime product produced solely for the United States." 02-506 Pet. 4.

ers to produce priority products, including avgas, to their existing capacity or even to seize refineries if necessary.[4] The government, however, very rarely used that authority, choosing instead to promote avgas production almost exclusively through non-coercive measures such as recommendations and contracts.[5] Pet. App. 6a; Stip. 43-44, 57, 59, 146-158, 200-201 (L13-L16, L36-L38, L46).

The United States also employed programs such as the Planned Blending Program to gather and use inventory information to maximize avgas production. Pet. App. 6a-7a. Before the war, petitioners had shared their avgas technology with each other and had commonly exchanged products to balance out their product requirements. Stip. 125-127, 135-137, 210 (L30-L33, L48). The Planned Blending Program built on that practice: industry representatives would report on their anticipated supplies and use of avgas components, and the United States would occasionally instruct them on how to shift the supplies among themselves so that they could be used to maximum advantage. Pet. App. 6a-7a; Stip. 221-241 (L51-L59). The Planned Blending Program directly affected only how companies blended avgas components after their manufacture and thus did

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[4] Petitioners ARCO and Texaco err in stating (02-500 Pet. 5) that WPB and PAW could "compel refiners to increase their existing capacity to produce certain fuels." See Stip. 57, 59 (L15-L16) (government could "require a company to produce a good needed for the war effort *where it was within the company's physical and technical capacity to do so*") (emphasis added); see also Stip. 200-201 (L46).

[5] The few seizures in the record occurred at the end of or after the war and were "paper seizures" intended to aid the petroleum industry in the face of labor problems. Stip. 289-295 (L67-L68); L226-L228.

not directly affect waste generation, which occurred during the production of avgas components, not their blending. Pet. App. 7a; Stip. 14-16, 221, 225 (L8, L51-L52).

Within the regulatory structure described above, petitioners were active and eager participants in the avgas industry. Before, during, and after the war, each of petitioners owned and operated one or more refineries that manufactured avgas and other products and that produced acid waste. Stip. 144, 174, 495-496, 499 (L35, L41, L129-L130). Petitioners actively initiated proposals before and during the war for priority rankings to obtain construction materials to expand their refineries for avgas production and, when they received the necessary approvals, invested tens of millions of dollars to do so. Stip. 147, 162, 268-278 (L36, L39, L64-L66). The United States solicited such proposals from refiners and made construction loans and tax benefits available to owners of refineries that produced avgas, but imposed no requirement that refiners submit any such proposals. Stip. 152, 155-156, 162-163, 532-542 (L37-L39, L140-L142).

Much as they made independent decisions to build and expand refineries to produce avgas, petitioners actively and independently pursued contracts to sell avgas to the United States. Pet. App. 7a; Stip. 19-26, 154-158, 166 (L9-L10, L38, L40). The contracts were negotiated individually with each refiner and contained individualized terms suiting particular refiners' interests. Stip. 159-161, 164-168, 181-183 (L39-L40, L42-L43). The United States generally agreed to purchase petitioners' entire output of avgas at a fixed price for three years. Stip. 148-158 (L36-L38). That price was negotiated individually with each company and gener-

ally included an estimated profit of six to seven percent. Stip. 164-170 (L39-L40).

Although the United States built and owned some refineries during the war, the plants relevant here existed in some form prior to the war and were designed, built, and owned in full by petitioners. Pet. App. 7a; Stip. 74, 174, 267, 281 (L19-L20, L41, L64, L66). Petitioners were responsible for the daily operation and maintenance of the physical equipment. Stip. 279, 287-288 (L66-L67). Petitioners handled their own personnel matters at the plants and selected their own officers and management. Stip. 280, 282 (L66).

Petitioners received significant benefits from the avgas program. In addition to their direct profit under the wartime contracts, petitioners made plans from the very beginning of the war to market and expand their production of high-octane gasoline at war's end. Stip. 29-41, 298-300 (L11-L13, L68-L69). After the war, petitioners retained ownership of the facilities they had built with the help of government loans. Pet. App. 7a; Stip. 152 (L37-L38). Although it was expected that military demand for avgas would drop, the oil industry anticipated that higher octane fuels would have significant application in the private automobile and aviation industries, and petitioners held a tremendous competitive advantage after the war because of their participation in the avgas program. Stip. 297-317 (L68-L72).

b. To produce avgas, refiners used sulfuric acid, which served as a catalyst in the "alkylation" process. Stip. 14, 493-494 (L8, L128-L129). That process produced an avgas component known as "alkylate" as well as "spent alkylation acid" (about 87%-90% acid by weight), which remained relatively high in acid content and thus was a valuable commodity. *Ibid.* Spent alkylation acid could be used for other purposes, reproc-

essed into fresh sulfuric acid, or sold to other users. Pet. App. 5a, 7a; Stip. 325, 329, 343, 346 (L73-L75, L77).

The production of avgas was, however, not petitioners' sole reason to use acid and produce acid waste. One important use for acid was the acid treatment process, used by refiners for decades before the war, in which refiners removed impurities from petroleum fractions for use in avgas or other products. Pet. App. 7a-8a; Stip. 15-16, 325, 344, 431, 484, 496, 499, 514-515 (L8, L73-L74, L77, L103-L104, L124, L129, L130, L133). Acid treatment converted fresh acid or spent alkylation acid into acid sludge, which had lower acid content (about 45%-65% acid by weight). Pet. App. 8a; Stip. 324, 496 (L73, L129). Refiners generally did not reuse acid sludge, and reprocessing it was technically feasible but relatively difficult and expensive. Pet. App. 8a; Stip. 329, 376, 382 (L74-L75, L84, L87). Thus, when the war began, acid sludge dumping and burning were common practices in California and nationwide. Pet. App. 8a; Stip. 326-328, 409-410, 443-448 (L74, L94, L114-L115).

During the war, petitioners contracted with Eli McColl, a former Shell employee, for the disposal of some of their acid waste. Pet. App. 9a; Stip. 1, 435-442 (L6, L111-L113). He was paid a fee per barrel of waste removed and guaranteed a minimum number of barrels. Stip. 475-478 (L122-L123). He dumped the waste at a site in Fullerton, California, from June 1942 until September 1946, more than a year after war's end. Pet. App. 9a; Stip. 2 (L6). Although the waste at the McColl site included some spent alkylation acid, the vast majority was acid sludge, the same refinery by-product that petitioners had produced and dumped or burned long before the development of avgas and the associated alkylation process. Pet. App. 9a, 70a. Although all the

spent alkylation acid at the McColl site was directly connected to the avgas program, most of the acid sludge was not.[6] *Id.* at 9a. Instead, it was the direct result of acid treatment in the production of various items for military and civilian sale.[7] *Ibid.*; Stip. 325, 427, 431, 493-496 (L73-L74, L98, L103-L104, L128-L129). A small portion of the waste at the McColl site was acid sludge resulting from Shell's treatment of a government-owned supply of a chemical called benzol. Pet. App. 9a, 69a; Stip. 432- 434, 498 (L110-L111, L130).

The United States was not directly involved with dumping operations at the McColl site. It issued no orders requiring or approving the dumping of acid waste. Pet. App. 9a; Stip. 400 (L92). It was not party to or aware of Eli McColl's disposal contracts with petitioners. Pet. App. 9a; Stip. 480 (L123). Indeed, the wartime avgas contracts between the United States and petitioners contained no provisions regarding waste ownership, handling, or disposal, which remained petitioners' responsibility. Stip. 184-185 (L43).

Although the WPB priorities system was concerned with the efficient use of goods and facilities for the war

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[6] Although the avgas program led to an increase in spent alkylation acid, which was the direct result of the alkylation process, petitioners ARCO and Texaco err in stating that the program also increased the amount of acid sludge produced at their refineries. 02-500 Pet. 8. Acid sludge production remained relatively constant even as avgas production increased greatly. Stip. 319 (L72); Gov't C.A. E.R. 475, 521, 532-533, 537, 544-546.

[7] An expert testified at trial that the avgas program resulted in at most 13% of the acid sludge. Pet. App. 70a. Petitioners ARCO and Texaco state that all the waste resulted from the manufacture of "wartime products" for which the United States was the "exclusive ultimate purchaser" (02-500 Pet. 3), but the stipulated facts indicate otherwise. Stip. 431 (L103-L104).

effort, not with waste disposal, that system did have the potential to affect the amount of acid waste eventually dumped. Pet. App. 8a. Those wishing to use scarce materials during the war to construct acid waste reprocessing facilities needed WPB approval, and the United States thus had the power to limit the reprocessing industry's capacity. Stip. 52-53, 338-342 (L15, L76). During the war, however, the WPB approved many applications to build reprocessing plants in Southern California and declined only one, on the basis that then-existing facilities appeared sufficient. Stip. 351-353, 379-383 (L78, L85-L87). Indeed, from before the war through late 1944, spent alkylation acid reprocessing capacity in Southern California appeared to meet refiners' needs. Petitioners contracted with companies such as Stauffer Chemical Company (Stauffer) to reprocess spent alkylation acid they did not use within their refineries. Stip. 343-353 (L77-L78). They dumped spent alkylation acid at the McColl site only because technical problems at a Stauffer plant led to a temporary shortfall of reprocessing capacity in Southern California. Stip. 357-365, 493 (L78-L81, L128). The dumping ended after petitioners reached agreement with another company for temporary use of a storage tank. Stip. 366-371 (L81-L83).

Government regulation similarly had little effect on petitioners' disposal choices regarding acid sludge. Petitioners generally continued their pre-war practice of dumping or burning acid sludge. Stip. 409-412, 489, 506-509 (L94-L95, L125-L126, L131). Among petitioners, only Texaco requested a priority rating to construct an additional plant to reprocess acid waste. Stip. 379-381 (L85-L87). Although WPB denied Texaco's request, it approved Stauffer's request to build a much larger plant designed to reprocess both spent

alkylation acid and acid sludge. Stip. 357, 379-381 (L78-L79, L85-L87). If not for unexpected technical problems (which were not caused by the United States), that plant would have been available to handle acid sludge when Texaco began dumping late in the war. Stip. 357, 508-511 (L78-L79, L131-L132).

Another alternative to dumping or burning acid sludge, occasionally used by petitioners, was to ship acid sludge using railroad tank cars to Shell's fertilizer plant near San Francisco. Stip. 411, 513 (L94, L132-L133). Tank car shortages were an issue during the war, but dumping rarely resulted from tank car shortages.[8] Stip. 404-405 (L93). Furthermore, although WPB took steps to try to alleviate such shortages, companies were ultimately responsible for making their own arrangements for tank cars. Stip. 403 (L93). Petitioners introduced no evidence that they ever requested WPB to use its authority to provide them with tank cars.[9] In any case, whatever the effect of wartime controls, petitioners continued dumping acid sludge after the war, both at the McColl site and elsewhere.[10] Pet. App. 29a; Stip. 2, 428 (L6, L98-L99).

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[8] The periods of dumping did not correlate well with the periods of tank car shortages. Stip. 414-420 (L95-L97); Gov't C.A. E.R. 506-518. Indeed, during the war, Shell's fertilizer plant had virtually all the acid sludge it needed from local sources. Gov't C.A. E.R. 4-5, 529-530.

[9] Eli McColl testified before a county commission in 1942 that "the government [would] not allow [him or the companies he represented] to use tank cars," but he did not indicate whether he had ever requested tank cars or was merely making a prediction. Stip. 487 (L125).

[10] Petitioners ARCO and Texaco err in stating that dumping "ceased when wartime production controls ceased and reprocessing alternatives again became available." 02-500 Pet. 8 n.4.

3. On February 1, 1991, the United States and the State of California sued petitioners and other companies no longer involved to recover costs incurred at the McColl site. In response, petitioners filed counterclaims alleging that, through its wartime regulation of the petroleum industry, the United States "arranged for disposal" of the waste at the McColl site and was thus liable under Section 107(a)(3) of CERCLA. While litigation continued, petitioners implemented a cleanup remedy at the site pursuant to an administrative order issued by the United States Environmental Protection Agency under Section 106, 42 U.S.C. 9606. Cleanup at the McColl site ultimately cost close to $100 million. Pet. App. 9a. In 1998, the site was converted into a wildlife sanctuary and community recreation facility. *Ibid.*

On September 28, 1993, the district court entered partial summary judgment for the plaintiffs regarding petitioners' liability. Pet. App. 106a. The United States and petitioners thereafter submitted 431 stipulated facts (L1-L106) and filed cross-motions for partial summary judgment on the counterclaims. On September 18, 1995, the district court entered partial summary judgment for petitioners regarding the liability of the United States. Pet. App. 46a.

In February 1998, after the submission of another 193 stipulated facts (L107-L168), the district court conducted a trial to allocate the response costs between petitioners and the United States. Pet. App. 58a. On August 11, 1998, based on its conclusions that all the waste in question was attributable to the avgas and benzol programs and that the United States should bear total responsibility for such waste, the district court issued a memorandum and order assigning the United States responsibility for all the cleanup costs at

the McColl site. *Id.* at 83a. The district court later entered a final judgment under Federal Rule of Civil Procedure 54(b). Pet. App. 51a.

4. The court of appeals reversed in relevant part. Pet. App. 1a-30a. The United States had earlier conceded that it had arranged for disposal of the portion of waste at the McColl site related to Shell's processing of government-owned benzol. *Id.* at 4a. About 5.5% of the waste at the site was related to benzol. *Id.* at 9a, 69a. Thus, the court of appeals considered whether the United States arranged for disposal of the "non-benzol waste" comprising the other 94.5% of the waste. *Id.* at 14a-24a.

The court of appeals first rejected the possibility of "direct arranger liability." Pet. App. 15a-17a. The district court had found that the United States had affirmatively "undertak[en] the responsibility for disposing" of the waste at the McColl site. *Id.* at 45a-46a. Referring to the stipulated facts, the court of appeals stated: "There are simply insufficient facts in the record to support a conclusion that the United States directly entered into arrangements to dispose of acid waste at the McColl site." *Id.* at 16a-17a.

The court of appeals next concluded that the facts also would not support arranger liability for non-benzol waste on a broader theory based on the United States' supposed control over avgas manufacture. Pet. App. 17a-24a. The court of appeals agreed with petitioners that "control is a crucial element of the determination of whether a party is an arranger" under Section 107(a)(3). *Id.* at 17a. Furthermore, it recognized that "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability." *Ibid.* Thus, it recognized that its task required comparing the facts here with those of other decisions—in

particular, decisions considering what kind of control a party must exercise over a process that produced hazardous waste in order to impute arranger liability to that party for the eventual disposal of that waste. *Id.* at 17a-24a. Based on a detailed comparison of the facts here with those in other cases, the court of appeals concluded that the United States did not exercise the kind of control over the avgas process necessary to find that the United States indirectly arranged for the disposal of non-benzol waste. *Ibid.*

The court of appeals disagreed with petitioners' contention based on *United States* v. *Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*), 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987), that "mere 'authority to control' is sufficient." Pet. App. 20a. Unlike a party found responsible as an arranger in that decision because he held direct authority to control through a corporate chain of command, "the United States neither exercised actual control, nor had the direct ability to control, in the sense intended in *NEPACCO*." *Id.* at 21a. The court of appeals agreed with a district court decision that arranger liability should not apply to "a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue." *Id.* at 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)).

The court of appeals also rejected the contention that "the government's activities * * * constituted an 'act of war'" that absolved petitioners of liability under Section 107(b). Pet. App. 27a-29a. Even if petitioners had shown that the government's activities constituted such an "act of war," those activities were not the sole cause of petitioners' disposal actions, as required to defeat liability under that provision:

> The undisputed facts indicate that [petitioners] had other disposal options for their acid waste, that they dumped acid waste from operations other than avgas production at the McColl site, and that they were not compelled by the government to dump waste in any particular manner.

Id. at 29a.[11]

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. It is also highly fact-specific, involving the legal consequences under CERCLA of a unique World War II-era system of regulation, as applied to the production and disposal of particular products. Further review is not warranted.

1. The decision of the court of appeals is correct. This case does not involve the ordinary scenario for arranger liability, in which a party generates hazardous waste and directly contracts with another party for disposal or treatment of that waste, for the United States neither generated nor made any arrangements regarding the waste at the McColl site. Stip. 184-185, 400 (L43, L92). Petitioners claim that the United States is liable under a broader theory of arranger liability, both because of the government's purchase of avgas and regulation of avgas manufacture and because

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[11] The court of appeals affirmed the district court's conclusions that the United States had waived its sovereign immunity to petitioners' counterclaims and that the United States should bear full responsibility for cleanup of benzol-related costs. Pet. App. 10a-14a, 24a-27a.

of its actions affecting petitioners' disposal options other than dumping.[12]

a. Under CERCLA, one who effectively controls another party may be found liable for that party's arrangements for disposal of waste. In such a case, the question is "whether in light of all the circumstances the transaction involved an arrangement for disposal or treatment of a hazardous waste." *Cadillac Fairview/Cal., Inc.* v. *United States*, 41 F.3d 562, 566 (9th Cir. 1994) (per curiam); see *Florida Power & Light Co.* v. *Allis Chalmers Corp.*, 893 F.2d 1313, 1317-1318 (11th Cir. 1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380-1381 (8th Cir. 1989). As the court of appeals concluded, the facts of this case do not support a finding of arranger liability under that principle.

Petitioners argue (02-500 Pet. i, 3; 02-506 Pet. 13-16) that the United States is liable because it coerced them into producing avgas. Petitioners, however, were willing and eager participants in the avgas market. They began developing avgas technology well before the war. Stip. 18-41 (L9-L13). They actively sought avgas con-

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[12] The United States denies petitioners' contention (02-500 Pet. 19-20) that it would seek to impose arranger liability upon a private party in its position. The Environmental Protection Agency enforces CERCLA against federal agencies and has issued guidance requiring that it treat federal entities as it would treat private parties. See Jerry Clifford, Director, Office of Site Remediation Enforcement, *Documentation of Reason(s) for Not Issuing CERCLA §106 UAOs to All Identified PRPs* 3 & n.2 (Aug. 2, 1996), <http://www.epa.gov/Compliance/resources/policies/cleanup/superfund/reason-cer106-rpt.pdf>. On a related note, petitioners' contention (02-500 Pet. 25-26; 02-506 Pet. 20, 27-28) that the court of appeals improperly treated the United States differently from private parties is also mistaken. The court of appeals applied general principles under CERCLA to the unique facts presented in this case.

tracts and initiated proposals before and during the war to expand their refineries to meet demand. Stip. 147, 154-158, 268-278 (L36, L38, L64-L66). There is no evidence that petitioners ever desired to stop producing as much avgas as the United States would buy.[13] The United States did not coerce petitioners to produce avgas.

Petitioners also err (02-500 Pet. 7 n.3 (quoting Pet. App. 45a)) when they state that it was "undisputed" that the United States "controlled the specifications, quantities, delivery, and price of avgas". The United States controlled those terms only in the sense that every party controls the terms on which it chooses to contract; petitioners exercised similar control. The avgas contracts were based on petitioners' own proposals and included unique terms tailored to each company's particular interests. Stip. 159-161, 166, 181-183 (L39-L40, L42-L43). Contrary to petitioners' contentions (02-500 Pet. 7 & n.3; 02-506 Pet. 6-13), the Planned Blending Program did not provide the United States with substantial control over avgas production. That program did not involve the production of avgas components, which was responsible for the waste at issue here, see Stip. 9, 14-16 (L7-L8), but rather the blending of those components after production. Stip. 212, 221-225 (L49, L51-L52). Moreover, although the United States could require a transfer when one refinery's surplus of an avgas component could offset a deficit of another (in a fashion similar to refiners' pre-war pro-

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[13] Former PAW official J. Howard Marshall, one of the witnesses whose testimony petitioners emphasize, testified that the United States "never really had to" invoke its wartime powers to force refiners to produce avgas. L174. Indeed, the President of Union Oil urged the United States to assume greater regulatory authority over avgas production. Stip. 101 (L24).

duct exchanges), the government usually accepted refiners' blending recommendations without alteration. Stip. 210, 225 (L48, L52). Accordingly, the parties stipulated that "[t]here is no direct evidence linking the Planned Blending Program to waste dumping at the McColl Site." Stip. 610 (L163).

b. Petitioners also contend (02-500 Pet. 3, 7; 02-506 Pet. 16-18, 23) that the United States "arranged for disposal" of the waste at the McColl site because it allegedly denied them resources for waste disposal. Petitioners, however, had alternatives to dumping at the McColl Site. See pp. 10-11, *supra*. Petitioners contend, for instance, that burning was an unpleasant option (02- 500 Pet. 8-9 n.4; 02-506 Pet. 17), but it was one they had used before the war and continued using during the war despite their professions of distaste today. Stip. 327, 372, 489, 500, 507-509, 513, 519, 521 (L74, L83, L125-L126, L130-L138). Contrary to petitioners' contention (02-500 Pet. 7; see *id.* at 8 n.4, 9), "[t]he undisputed facts indicate that [petitioners] had other disposal options for their acid waste * * * and that they were not compelled by the government to dump waste in any particular manner." Pet. App. 29a. Moreover, dumping was an option that petitioners had used before the war and continued using after the war, both at the McColl site and elsewhere. Stip. 2, 327-328, 409-410, 428, 443-448 (L6, L74, L94, L98-L99, L114-L115).

In addition, petitioners' theory that the government is liable as an "arranger" under CERCLA because it limited their disposal options is legally unsound. CERCLA requires proof of an "arrange[ment] for disposal or treatment" of a hazardous substance. 42 U.S.C. 9607(a)(3). That language predicates arranger liability on a party's affirmative acts regarding disposal. See *United States* v. *Cello-Foil Prods., Inc.*, 100 F.3d

1227, 1232 (6th Cir. 1996); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1506 (11th Cir. 1996); *Amcast Indus. Corp.* v. *Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), cert. denied, 510 U.S. 1044 (1994). It is inconsistent with petitioner's theory that the United States arranged for disposal of the waste simply by taking unrelated actions that made it harder for petitioners to dispose of that waste.

In sum, while petitioners independently decided to manufacture avgas, controlled the day-to-day operations that produced waste, and arranged for that waste's disposal, the United States was two steps removed from dumping: it had no significant presence at or operational control over petitioners' refineries, and it had nothing to do with the site where Eli McColl eventually dumped petitioners' waste from those refineries. At root, petitioners' argument is that the United States is liable for the disposal of all waste produced by a closely-regulated industry. There is no indication that Congress meant to ascribe such a broad scope to arranger liability and so drastically burden government regulation of industrial practices.

2. Petitioners argue (02-500 Pet. 16-27; 02-506 Pet. 23-26) that the decision of the court of appeals conflicts with decisions of other courts addressing arranger liability under CERCLA. Petitioners contend that what they term "the Ninth Circuit's narrow focus on actual ownership or direct control over the disposal arrangements" conflicts with the decisions of several other courts of appeals, which in petitioners' view hold "that a causal nexus between a party's conduct and the waste disposal is *sufficient* to establish arranger liability." 02-500 Pet. 24 (emphasis added). The decision of the Ninth Circuit is consistent with the decisions of the other courts petitioners cite (*id.* at 20-24), many of

which the Ninth Circuit itself cited approvingly in its opinion.[14]

a. Initially, petitioners misread the Ninth Circuit's decision when they state (02-500 Pet. 16) that it "held that arranger liability requires either: (1) ownership of raw materials or intermediate products at another's facility or (2) direct control of the disposal of hazardous waste at a particular location." The Ninth Circuit did discuss the concepts of "ownership" and "direct control" in the process of distinguishing this case from the Eighth Circuit's decision in *NEPACCO*. But, contrary to petitioners' contention, the court of appeals did not hold that those are the exclusive factors on which arranger liability may be based. See Pet. App. 20a-21a. Instead, it explicitly and properly recognized that a party might be liable if it bore a "duty to dispose" of the hazardous materials, even if it did not directly arrange for disposal. *Id.* at 22a (quoting *United States* v. *Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1451 (E.D. Cal. 1995)). Based on an analysis of the facts of this case, the court simply disagreed with petitioners' contention that the government's actions resulted in such a "duty to dispose" here.

Petitioners also misread the decisions of the other courts they cite to hold that a "causal nexus" between a party's conduct and the disposal of waste is "sufficient" to result in arranger liability under CERCLA. Although a "causal nexus" is no doubt necessary for arranger liability, no court has held that it is sufficient. A

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[14] Compare, *e.g.*, 02-500 Pet. 21-22 and 02-506 Pet. 23-24 (relying on *General Elec. Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) (per curiam)), with Pet. App. 22a (citing and quoting the same case); 02-500 Pet. 21 (relying on *United States* v. *Vertac Chem. Corp.*, 46 F.3d 803, 811 (8th Cir.), cert. denied, 515 U.S. 1158 (1995)), with Pet. App. 23a-24a (relying on the same case).

manufacturer would not produce hazardous waste if not for its customers, for instance, but Congress obviously did not mean to impose arranger liability on every purchaser of a product whose manufacture generated hazardous waste. The question in cases like this one is not whether the putative arranger shares *any* causal relationship with waste disposal, but whether the putative arranger exercised sufficient control over the process of waste generation and disposal.

b. There is no conflict between the decision of the Ninth Circuit that the United States is not liable as an arranger on the facts of this case and the decisions of the other courts that petitioners cite holding that arranger liability under CERCLA was appropriate on the facts of those cases.

The decision in this case does not conflict with the Eighth Circuit's decision in *Aceto Agricultural Chemicals Corp.*, *supra* (cited at 02-500 Pet. 16-17). As the Ninth Circuit explained (Pet. App. 18a), *Aceto* involved a far closer relationship between the arranger and the waste, in which the arranger owned the raw materials, contracted out a crucial waste-producing intermediate step in the production process to another firm, and then received back the resulting product. See *Aceto*, 872 F.2d at 1381. Although ownership of the raw materials and finished products is not dispositive of arranger liability in all cases, it is a relevant factor that, together with the other differences between the cases, distinguishes this case from *Aceto*.

Similarly, the decision in this case does not conflict with the Eighth Circuit's decision in *NEPACCO* (cited at 02-500 Pet. 17-20). In that case, the court held that the president of a corporation could be held liable as an arranger for the disposal of waste, where a subordinate official exercised actual control over the disposal of the

waste at issue. As the court of appeals explained in distinguishing *NEPACCO*, the United States would be liable as an arranger in this case if "authority to control * * * were sufficient without more" to establish liability. Pet. App. 20a. The decision in *NEPACCO* was based, however, not on an abstract "authority to control," but on the fact that "responsible officials in the chain of command of a corporation may be held responsible as arrangers when one of those officers has exercised actual control over the disposition of waste on behalf of the corporation, and the other officer has the authority to control the first officer." *Id.* at 20a-21a. See *United States* v. *TIC Inv. Corp.*, 68 F.3d 1082, 1089 (8th Cir. 1995) (test is whether purported arranger "*exercise[d]* actual or substantial control, directly or indirectly, over the arrangement for disposal") (emphasis added), cert. denied, 519 U.S. 808 (1996). The mere fact that the United States had the (largely unexercised) regulatory authority to order petitioners to take various actions during World War II does not put the United States in the same position with respect to the disposal of petitioners' waste that a president of a corporation occupies with respect to other corporate officers who directly arrange for the disposal of waste.

Petitioners' other claims of conflict are similarly mistaken. In *General Electric Co.* v. *AAMCO Transmissions, Inc.*, 962 F.2d 281 (2d Cir. 1992) (per curiam) (cited at 02-500 Pet. 22), the court held that certain oil companies were not liable under CERCLA as "arrangers" for the disposal of motor oil that was stored by dealers at service stations leased from the companies. That holding is entirely consistent with the court of appeals' decision that the government is not liable as an arranger in this case. Indeed, the court of appeals here relied in part on *General Electric*'s statement, cited by

petitioners (02-500 Pet. 22), that arranger liability turns in part on whether there is "the *obligation* to exercise control over hazardous waste disposal." 962 F.2d at 286 (cited at Pet. App. 22a). The court of appeals' decision is also entirely consistent with petitioners' position that "whether such [an] obligation exists is based on the party's conduct as it relates to the disposal of hazardous waste." 02-500 Pet. 22 (citing *General Electric*). The court of appeals simply concluded that, on the facts of this case, as in *General Electric*, the government's conduct did not lead to such an "obligation to exercise control."[15]

Petitioners contend (02-500 Pet. 22-23) that the decision in this case conflicts with decisions of the Fifth and Eleventh Circuits that a determination of arranger liability must "focus on all of the facts in a particular case." *South Fla. Water Mgmt. Dist.* v. *Montalvo*, 84 F.3d 402, 407 (11th Cir. 1996); see *Geraghty & Miller, Inc.* v. *Conoco, Inc.*, 234 F.3d 917, 929 (5th Cir. 2000) ("totality of the circumstances"). The court of appeals in this case similarly concluded that "[t]here is no bright-line test, either in the statute or in the case law, for a broad theory of arranger liability under [CERCLA]." Pet. App. 17a. Indeed, the court in this case undertook an exhaustive review of all of the relevant facts in this case before concluding that arranger liability should not be imposed. See *ibid.* ("[W]e are required to sort through the fact patterns of the decided cases in order to find similarities and dissimilari-

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[15] For the same reason, the decision of the court of appeals is entirely consistent with the Eleventh Circuit's recognition of "the possibility that a party could so control and benefit from another company's production of hazardous waste that arranger liability would arise." 02-500 Pet. 23 (quoting *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir. 2000)).

ties to the fact pattern of [this] case."). The reasoning and result of the court of appeals in this case are consistent with the Fifth and Eleventh Circuit cases cited.

3. a. Petitioners also assert (*e.g.*, 02-506 Pet. 3) that the court of appeals' decision conflicts with the Third Circuit's en banc decision in *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833 (1994). *FMC* involved "operator" liability under Section 107(a)(2), not, as in this case, "arranger" liability under Section 107(a)(3). Under Section 107(a)(2) of CERCLA, liability attaches to any party who "operated" a facility at a time when hazardous waste was disposed there. 42 U.S.C. 9607(a)(2). Petitioners contend (02-506 Pet. 26) that the statutory distinction between "operator" liability and "arranger" liability "has no bearing," and that the Ninth Circuit's decision conflicts with *FMC*.

Petitioners are mistaken (02-506 Pet. 26-28) that the distinction between "operator" liability and "arranger" liability is of no significance. The two species of liability are based on different statutory provisions and require different elements of proof. Under Section 107(a)(2), a party who "owned or operated" a facility at which "hazardous substances were disposed of" is liable. 42 U.S.C. 9607(a)(2). By contrast, Section 107(a)(3) imposes liability on a party that "arranged for disposal or treatment * * * of hazardous substances." 42 U.S.C. 9607(a)(3). Whereas the former inquiry focuses on the question of ownership or operation *of the facility*, the latter inquiry focuses on the question of arranging for the disposal *of the substances*. See *TIC Inv. Corp.*, 68 F.3d at 1090 n.7 ("The language related to operator liability * * * does not require any involvement in the disposal activities themselves."). Petitioners cannot simply import analyses relating to "operator" liability

without accounting for the differences in the statutory formulae.

In any event, even if the two types of liability had identical prerequisites, petitioners' claim of conflict would be mistaken. As the court of appeals in this case explained, the court in *FMC* found the United States liable as an operator of a wartime plant where the United States required the owner of that plant to convert it to manufacture rayon; owned much of the manufacturing equipment; required the use of government-supplied raw materials; participated in managing and supervising the workers; and directly controlled the manufacturing process. Pet. App. 22a-23a; see *FMC*, 29 F.3d at 836-837. In this case, the government did not require petitioners to manufacture any product that they sought to avoid; did not own any of the manufacturing equipment; did not supply the raw materials; did not participate in managing and supervising the workers at petitioners' facilities; and did not directly control the manufacturing process. The degree of control in *FMC* was substantially greater than that here. There is thus no conflict.[16]

b. Petitioners invoke (02-506 Pet. 3, 22, 26) this Court's decision regarding "operator" liability under Section 107(a)(2) in *United States* v. *Bestfoods*, 524 U.S. 51 (1998), although they do not expressly assert that the decision of the court of appeals conflicts with it. In

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[16] Moreover, as the court of appeals found, the *FMC* court divided evenly on the question whether the United States bore arranger liability. Pet. App. 23a; *FMC*, 29 F.3d at 845-846. The court of appeals thus recognized: "If it was a close question on the facts of *FMC* * * * , it cannot possibly be a close question on the facts in the case before us." Pet. App. 23a. The result in *FMC* also shows the error in petitioners' attempt to eliminate the distinction between operator liability and arranger liability.

Bestfoods, this Court considered whether and when a parent corporation would share its subsidiary's "operator" liability under Section 107(a)(2). 524 U.S. at 61-64. Petitioners contend that their wartime relationship with the United States was comparable to a parent-subsidiary relationship. 02-506 Pet. 15-16, 21-23. That comparison is weak. Unlike a parent corporation, the United States held no interest in petitioners' refineries, made no profits from petitioners' business, and did not manage petitioners' operations. Its relationship with petitioners' plants was based on contract and regulation, not ownership and management. Accordingly, there is no basis in this case to apply to the United States the "veil piercing" theory of "operator" liability that the Court discussed in *Bestfoods*.

Absent piercing, the pertinent question under *Bestfoods* is whether the parent's actual actions regarding hazardous waste (as opposed to the parent's general control over the subsidiary) make the parent directly (as opposed to derivatively) liable. 524 U.S. at 64-67. This Court explained:

> [U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA's concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

Id. at 66-67. The United States did not "operate" petitioners' refineries within the meaning of CERCLA and thus should not be held responsible for the arrangements for disposal of the waste generated there. In-

deed, numerous courts have declined to impose "operator" liability on the United States on similar facts dealing with wartime industrial regulation. See *East Bay Mun. Util. Dist.* v. *United States Dep't of Commerce*, 142 F.3d 479, 484-487 (D.C. Cir. 1998); *United States* v. *Vertac*, 46 F.3d 803, 808 (8th Cir.), cert. denied, 515 U.S. 1158 (1995); *Washington* v. *United States*, 930 F. Supp. 474, 483-485 (W.D. Wash. 1996); *Maxus Energy Corp.* v. *United States*, 898 F. Supp. 399, 408 (N.D. Tex. 1995), aff'd, 95 F.3d 1148 (5th Cir. 1996) (Table); *Iron Mountain Mines, Inc.*, 881 F. Supp. at 1450-1451. The decision of the court of appeals comports fully with those decisions and with *Bestfoods*.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In The
Supreme Court of the United States

ATLANTIC RICHFIELD COMPANY and TEXACO, INC.

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

SHELL OIL COMPANY and UNION OIL COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF THE PETITIONERS

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The American Petroleum Institute ("API") respectfully files this brief *amicus curiae* in support of petitioners Atlantic Richfield Company and Texaco, Inc. in Case No. 02-500 and petitioners Shell Oil Company and Union Oil Company in Case No. 02-506.[1] Because both of the petitions arise out of the same decision of the U.S. Court of Appeals for the Ninth Circuit and because the petitions raise substantially the same issue, API is filing this *amicus* brief in support of both petitions.[2]

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry. API's members have been identified as potentially responsible parties at contaminated sites across the country pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), and have participated in cleaning up many such sites. Moreover, API's members have undertaken various activities for and at the direction of the United States and instrumentalities of the federal government. Therefore, API and its members have a substantial interest in the standards for liability for cleanup costs under CERCLA. In particular, API and its

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[1] No counsel for any party has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief.

[2] Written consent has been obtained from counsel for all petitioners and the respondent for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the Clerk's Office.

members have a strong interest in the standards for determining the extent of the federal government's liability for the costs of cleaning up contamination at numerous sites throughout the country that are associated with wartime and other activities performed by industry on behalf of the United States.

SUMMARY OF THE ARGUMENT

The Court should grant the writs because the central issue raised in both petitions is a question of fundamental national importance that should be decided by this Court. Both petitions arise out of the Ninth Circuit's decision in *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002) ("*Shell*"), in which the court held that the United States was not liable under CERCLA as an "arranger" for certain costs of cleaning up the McColl Superfund Site in Fullerton, California.[3] The court reached this conclusion despite the federal government's extensive involvement in the production of aviation fuel during World War II that resulted in the generation of the waste material disposed of at the McColl Site, and the government's effective foreclosure of other options for managing the waste.

The Ninth Circuit's ruling is of critical importance. First, the precedent established by the ruling could have

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[3] The United States conceded that it had arranged for the disposal of waste at the McColl Site that was associated with the production of benzol (which was in turn used in the production of aviation gasoline), and therefore was liable under CERCLA for the costs of cleaning up such waste. *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018, 1024 (C.D. Cal. 1998). The benzol-related waste constituted 5.5% of the total waste at the McColl Site. *Id.* The petitions in this case relate to the costs of cleaning up the "non-benzol" waste at the Site.

important impacts on the scope of "arranger" liability under CERCLA generally, as well as on the extent to which the federal government will be required to contribute to the cost of cleaning up historic contamination caused by activities undertaken by private parties on behalf of and at the direction of the United States. The decision will in many cases determine who will have ultimate responsibility for paying the billions of dollars that have been and will be spent in cleaning up numerous sites across the country.

In addition, the Ninth Circuit's decision to limit the scope of the federal government's liability for the environmental consequences of activities in which the government was extensively involved and which were being undertaken for its benefit will undoubtedly affect future commercial relationships between industry and the United States. The decision creates a significant and inequitable risk of liability for industries that supply the United States with goods and services urgently needed in time of war or other national emergencies. The decision could in many instances force industries to accept the risk of such liability, despite its inequity, because the alternative of refusing to undertake work that serves a vital national interest is simply untenable or even unavailable. For these reasons and the reasons set forth in the petitions, the Court should grant the writs to provide direction to the lower courts in addressing these issues of fundamental national importance.

REASONS FOR GRANTING THE WRITS

I. THE NINTH CIRCUIT RULING WILL HAVE A SUBSTANTIAL IMPACT ON THE SCOPE OF LIABILITY UNDER CERCLA

A. The Scope of CERCLA "Arranger" Liability Potentially Affects the Allocation of Responsibility For Billions of Dollars in Cleanup Costs

The decision of the Ninth Circuit will have a significant impact on parties who face potential liability for the costs of cleaning up thousands of contaminated sites across the country. In particular, the Ninth Circuit's ruling will have an immediate and direct impact on the scope of liability under section 107 of CERCLA, 42 U.S.C. § 9607, for those who are alleged to have arranged for the disposal of hazardous substances at a site. In this case, the Ninth Circuit ruled that the United States did not arrange for the disposal of certain hazardous substances at the McColl Site and therefore should not be held responsible for cleaning up the vast majority of the contamination at this site. The court based its decision on the grounds that the U.S. neither owned the materials used in the manufacturing process that generated the waste nor exercised actual control over the waste disposal process. *Shell*, 294 F.3d at 1056-57. In doing so, the court rejected a test for imposing "arranger" liability on the basis of the authority to control the processes related to the generation and disposal of waste or the exercise of extensive indirect forms of control over such generation and disposal. Thus, the Ninth Circuit adopted a very narrow view of "arranger" liability that is sharply at odds with the rulings of other federal appellate courts. *See, e.g., United States v. TIC Inv. Corp.*, 68 F.3d 1082 (8th Cir. 1995)

("*TIC*"). The impact of the ruling will be to effectively exempt certain types of parties from CERCLA liability in many cases, including those parties that exert substantial influence over the disposal of hazardous waste or have the authority to control such disposal but who do not exercise such control in ways that are direct and overt.

The ruling will clearly affect the allocation of CERCLA liability at sites within the Ninth Circuit. In addition, the Ninth Circuit's decision can be expected to serve as a precedent for courts in other circuits that have not yet definitively established standards for determining the scope of "arranger" liability. Even in those circuits where existing case law sets forth standards for "arranger" liability that conflict with the Ninth Circuit's holdings in this case, the analysis in *Shell* may nevertheless influence lower courts, for example, through the Ninth Circuit's narrow reading of precedents from other circuits. In any event, parties assessing their potential liability as arrangers in other circuits will be forced to weigh the potential influence of the Ninth Circuit's decision as indicating a trend in the case law toward a narrow view of "arranger" liability. Thus, the impacts of the Ninth Circuit decision could be felt far outside that court's jurisdiction.

The potentially dramatic impact of the Ninth Circuit's ruling in this case is underscored by the potentially enormous cost of the cleanups involved at contaminated sites to which the Ninth Circuit's ruling could apply, which could easily total billions of dollars. As the U.S. Court of Appeals for the Sixth Circuit has observed, "[w]ho bears the burden for hazardous waste cleanup costs is an issue of great consequence" in light of the steadily rising costs of cleaning up these contaminated sites. *Centerior Serv. Co. v. Acme Scrap Iron*

& Metal Corp., 153 F.3d 344, 349 n.9 (6th Cir. 1998) (noting that the average cost of cleanup at a CERCLA site had reached 25 to 30 million dollars).

The impacts of the Ninth Circuit's ruling that the United States is not liable for the costs of cleaning up contamination associated with the production of materials for the war effort will be felt most directly in cases involving the cleanup of other contaminated sites related to the production of materials by industry for the U.S. during both World Wars and other national emergencies. These activities involved not only the production of fuels, but also range from the manufacture of military equipment to the mining of necessary minerals. For example, this Court has previously examined the extensive involvement of the War Production Board ("WPB") in the mining industry as part of the nation's mobilization efforts during World War II. *See United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (claim for taking of private property resulting from WPB order directing the shutdown of certain gold mines). In fact, the scope of the WPB's authority was "astonishing in its breadth" and extended to many aspects of the American wartime economy. Nancy Perkins Spyke, *From War Strategy to Waste Strategy: The Validity of Government CERCLA Liability for War Production Site Cleanups*, 4 N.Y.U. Envtl. L.J. 263, 267 (1995) ("*War Strategy*"). *See also* Michael T. Janik & Michael Reis, *CERCLA Claims Against the Government: Rediscovering World War II Contracting Rules*, 66 Fed. Cont. Rep. (BNA) 207, 213-14 (1996) (reviewing the "extraordinary new world of federally ordered limitations, schedules, quotas, and employment rules" created between 1942 and 1945). The exercise of this authority led to the "direction and regulation of the industrial effort by the Federal Government, on a scale

and of an intensity unprecedented in the annals of our nation." John Lord O'Brian & Manly Fleischmann, *The War Production Board Administrative Policies and Procedures*, 13 Geo. Wash. L. Rev. 1, 4 (1944) ("*War Production Board*").

The extensive involvement of the federal government in war production activities has already given rise to a number of cases involving claims for recovery of the costs incurred in cleaning up the hazardous waste generated by these efforts. *See, e.g., FMC Corp. v. U.S. Dep't of Commerce*, 29 F.3d 833 (3d Cir. 1994) ("*FMC*") (liability for cleanup of wastes associated with rayon production); *E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce*, 142 F.3d 479 (D.C. Cir. 1998) (zinc mining) ("*East Bay*"); *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 299 F.3d 1019 (9th Cir. 2002) (synthetic rubber production); *Elf Atochem N. Am. v. United States*, 914 F. Supp. 1166 (E.D. Pa. 1996) (production of poison gas). These claims also extend to sites that were contaminated as a result of production of materials for other war efforts. *See, e.g., United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (production of Agent Orange for use in Vietnam). Given that "the number of private sites that could contain wastes derived from war production activities is potentially enormous," *War Strategy*, 4 N.Y.U. Envtl. L.J. at 269, the number of such claims can be expected to increase in the future.

In all of these cases, the courts have been or will be called upon to determine whether the costs of war should be placed solely on individual companies contributing to the war effort or should instead be shared by society as a whole. The latter result has been held by the U.S. Court of Appeals for the Third Circuit to be "neither untoward nor inconsistent with the policy underlying CERCLA." *FMC*, 29 F.3d at 846. The Ninth Circuit itself recognized

in this case that cleanup costs from wartime activities should properly be seen "as part of the war effort for which the American public as a whole should pay." 294 F.3d at 1060. Nevertheless, the Ninth Circuit held that the United States had no responsibility for cleaning up the vast majority of the contamination at the McColl Site, thereby establishing a precedent that places the bulk of cleanup costs from wartime activities on individual companies rather than on society as a whole.

The number of potentially contaminated sites associated with wartime activities and other defense-related efforts is suggested by the federal government's own cleanup activities. The Department of Defense has already investigated or otherwise addressed contamination at over 25,000 sites associated with military or other defense-related activities, including nearly 3,000 Formerly Used Defense Sites which were previously owned, leased or operated by the Department of Defense. U.S. Dep't of Defense, *Fiscal Year 2001 Defense Environmental Restoration Program Annual Report to Congress* 33 (2002). The Department of Defense has estimated that the cost of cleaning up the Formerly Used Defense Sites alone may be $15 to 20 billion. General Accounting Office, *Corps Needs to Reassess Its Determinations That Many Former Defense Sites Do Not Need Cleanup* 1 (2002).

Similarly, the Department of Energy has undertaken extensive efforts "to mitigate the risks and hazards posed by the legacy of nuclear weapons production." Office of Envtl. Mgt., U.S. Dep't of Energy, *Linking Legacies: Connecting the Cold War Nuclear Weapons Production Processes to Their Environmental Consequences* 1 (1997). Nuclear weapons production activities have resulted in a legacy of 1.5 billion cubic meters of

contaminated water and 73 million cubic meters of contaminated solid media. *Id.* at 71. This contamination is found, among other places, at sites that are being cleaned up by the U.S. Army Corps of Engineers (the "Corps") under the Formerly Used Sites Remedial Action Program ("FUSRAP") at a cost of up to $2.89 billion. U.S. Army Corps of Engineers, *Formerly Used Sites Remedial Action Program (FUSRAP): Report to Congress* 3 (1997). The Corps has clearly stated its intent to seek reimbursement of these cleanup costs from any private parties that may be liable for such costs under CERCLA. *Id.* at 32. Such cost recovery efforts by the federal government will almost certainly give rise to additional claims regarding the government's status as an "arranger" or "operator" that will be subject to the standards enunciated by the Ninth Circuit in this case.

Moreover, as discussed below, the Ninth Circuit's ruling may well affect even more broadly the determination of which non-governmental parties – including "arrangers," "operators" and others – are generally liable for cleaning up contaminated sites under the CERCLA program. There are thousands of contaminated sites around the country, not involving past activities of the government, that may give rise to claims for cost recovery or contribution under CERCLA. For example, as of October 1, 2002, there were 1,234 sites on the National Priorities List ("NPL"), which includes the sites that the U.S. Environmental Protection Agency ("EPA") has determined pose the highest risk to human health and the environment. *National Priorities List for Uncontrolled Hazardous Waste Sites*, 67 Fed. Reg. 65,315, 65,317-18 (2002). EPA has estimated that, through Fiscal Year 1998, potentially responsible parties had committed to conduct $15.5 billion in cleanups at such "Superfund"

sites while EPA itself has spent $16 billion to fund cleanups. General Accounting Office, *Superfund: Progress and Challenges*, Testimony of David G. Wood, Associate Director, Before the U.S. Senate Committee on Environment and Public Works 7 (1999). Moreover, a congressionally-authorized study recently concluded that the total cost to fund cleanups at these sites from Fiscal Year 2000 through Fiscal Year 2009 could be as much as an additional $18.3 billion. Resources For the Future, *Superfund's Future: What Will It Cost?* xxiii (2001). Thus, the amounts at stake in cost recovery and contribution claims under CERCLA will continue to be enormous and the issue of "arranger" liability will undoubtedly recur with frequency in connection with such claims even when the government is not a potentially responsible party.

In short, the decision of the Ninth Circuit in this case is likely to have wide-ranging impacts, potentially affecting the allocation of cleanup costs totaling billions of dollars at thousands of contaminated sites across the country. The issues raised by the Ninth Circuit's ruling are consequently of tremendous import for industry and for the nation as a whole.

B. The Ruling Will Affect Determinations of Liability In a Wide Variety of Contexts

The impact of the Ninth Circuit's decision will almost certainly extend beyond the bounds of "arranger" liability. For example, the criteria for determining the extent of liability in many other areas of CERCLA jurisprudence involve concepts of control or authority to control activities that are very similar to the standards for determining "arranger" liability under that law. In particular, the courts have held that liability as an "operator" under section 107(a) of CERCLA is

determined based on a party's actual control over a facility or its authority to control the disposal of hazardous substances. *See, e.g., East Bay*, 142 F.3d at 484-85. This test is very similar to the test established in some circuits for determining "arranger" liability, *see, e.g., TIC*, 68 F.3d at 1087-88, differing only in that the decision as to whether "operator" or "arranger" liability applies to a particular party generally depends on whether the hazardous substances were disposed of at the party's facility (resulting in possible "operator" liability) or at an off-site location (resulting in possible "arranger" liability). Thus, the Ninth Circuit's ruling likely will have substantial implications for determinations of "operator" liability under CERCLA as well.

The Ninth Circuit's ruling may also impact the CERCLA liability of many other parties - including financial institutions or commercial lenders, corporate parents, officers and directors - whose liability for cleanup costs may depend on the extent of their participation in the management of a facility or on their authority to control activities at a facility. For instance, CERCLA provides that commercial lenders may be held liable as "operators" if they participate in the management or operational affairs of a facility. *See* 42 U.S.C. § 9601(20)(F). Similarly, this Court has held that a corporate parent can be liable for disposal of hazardous substances by a subsidiary if the parent exercised a sufficient degree of control over the facility that produced the hazardous waste. *United States v. Bestfoods*, 524 U.S. 51, 71 (1998) ("*Bestfoods*"). *See also Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 937 (8th Cir. 1995) (president of corporation held liable as an "operator" under CERCLA based on his control of facility operations).

The concept of imposing liability for the effects of pollution based on a party's control of, or authority to control, the facility generating the pollution even extends beyond CERCLA and is embodied in many other environmental statutes. For example, liability has been imposed on operators of facilities under the federal Resource Conservation and Recovery Act based on the extent of a party's control of or authority to control operations at a facility. *See United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050, 1070 (D. Colo. 2000), *aff'd*, 303 F.3d 1232 (10th Cir. 2002) ("*Power Eng'g*"). Likewise, the courts have imposed "operator" liability for violations of the federal Clean Air Act on parties based on a significant degree of control over a facility. *See, e.g., United States v. Anthony Dell'Aquilla, Enters. & Subsidiaries*, 150 F.3d 329, 333 (3d Cir. 1998). In making these determinations, the courts have looked to decisions on "operator" liability under CERCLA - including this Court's decision in *Bestfoods* - in light of the similarities in language among environmental statutes and their shared broad remedial purposes. *See id.* at 334; *Power Eng'g*, 125 F. Supp. 2d at 1070 ("Although these tests have been devised to determine whether an individual or entity is an 'operator' under [CERCLA], there is no reason not to apply them to the 'operator' inquiry under the RCRA given the similarity of the definitions in both statutes."). Thus, it is reasonable to conclude that the Ninth Circuit's decision in this case, while arising in the context of "arranger" liability under CERCLA, may well have broader ramifications.

II. THE NINTH CIRCUIT RULING EXPOSES MANUFACTURING INDUSTRIES THAT DO BUSINESS WITH THE UNITED STATES TO UNREASONABLE AND INEQUITABLE RISKS OF LIABILITY

The ruling of the Ninth Circuit creates a significant and unreasonable risk that manufacturing industries, such as the petroleum and natural gas industry, that may be called on or encouraged to do business with the United States in order to further important national goals will be exposed to potentially enormous liability for environmental contamination that is largely attributable to the government itself. The Ninth Circuit's decision sends a clear message to manufacturing industries that the federal government will not take - and will not be required by the courts to take - responsibility for the long-term environmental consequences of activities undertaken by private industry at the behest of the United States, even where the government has made critical decisions and exercised substantial control over the activity resulting in the contamination. In so doing, the decision compounds the fundamental inequity of this result because it may put industry in the position of having no acceptable choice but to accept these liability risks.

At first glance, companies would appear to have at least two options in responding to the specter of multi-million dollar liabilities for environmental cleanup associated with production of equipment or material for the United States, *i.e.*, voluntarily accepting the risk of liability despite its unfairness, or simply refusing to do business with the United States. However, this is really a Hobson's choice. On the one hand, although a company could choose to accept the risk of liability for cleaning up

contamination that is ultimately the product of decisions made by the federal government, that outcome is decidedly inequitable and potentially enormously expensive. On the other hand, the alternative - avoiding liability by refusing to do business with the United States and thus refusing to contribute to national security or other important national goals - would be simply unacceptable for companies striving to be good corporate citizens. (In fact, the oil and natural gas industry's historic cooperation with the government during previous national crises demonstrates such a commitment to good corporate citizenship.) Moreover, the "option" of not doing business with the United States may be overshadowed, as it was during World War II, by the threat of government seizure of a facility that refuses to participate voluntarily in the government's efforts; or that "option" may simply not exist if the government has ordered the company to comply with government directives.[4]

The current war on terrorism and increased emphasis on homeland security demonstrate that the timing and nature of national emergencies cannot be predicted with any certainty. Industry may be called on at any time to provide necessary equipment or other materials to wage war, combat the effects of biological or chemical weapons or provide security for the nation's infrastructure. If industry plays its part in such situations

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[4] The United States in fact exercised both types of authority on occasion during World War II. *See, e.g., War Production Board*, 13 Geo. Wash. L. Rev. at 9-10 (discussing "compulsory orders which must be accepted under penalty of plant seizure and criminal sanctions"). Thus, in any future national emergency, potential government seizure of an industrial facility would not be seen as merely a hypothetical possibility.

willingly – as it has done consistently in the past – or is compelled by the government to provide essential goods and services, it should not be penalized by being forced to bear sole responsibility for multi-million dollar cleanups of environmental contamination largely attributable to the government's own decisions. Such an outcome undermines one of the primary goals of CERCLA – *i.e.*, the equitable distribution of cleanup costs. *See Boeing Co. v. Cascade Corp.*, 207 F.3d 1177, 1185 (9th Cir. 2000) ("To leave one party shouldering the entire cost of investigation and remediation while another rides for free frustrates th[e] goal [of imposing the ultimate cost of cleanup on the parties responsible for the contamination], rather than ensuring that those who caused the contamination pay their fair share of the costs associated with clean-up.")

Accordingly, the Court should grant the writs to address the impact of the Ninth Circuit's ruling in creating inequities in future commercial relations between vital industries and the federal government.

CONCLUSION

The decision of the Ninth Circuit will have potentially wide-ranging implications in determining who will bear the cost of cleaning up the legacy of decades of production efforts undertaken by industry on behalf of the United States to defend the country. In addition to its implications for activities undertaken in the past, the decision will also impact the relationship of industry and the federal government in the future, particularly in times of war or other national emergencies. Moreover, the decision could affect the scope of liability under CERCLA even more generally and may well affect the scope of liability under other

environmental statutes. Given the very significant import of the Ninth Circuit's decision, the Court should grant the writs in order to provide guidance to the lower courts on these critical issues.

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